IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC88959**
	)	
VINCENT McFADDEN,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
21ST JUDICIAL CIRCUIT, DIVISION FIFTEEN
THE HONORABLE JOHN ROSS, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Vincent was tried and convicted in St. Louis County Circuit Court of first-degree murder, §565.020RSMo,[1] and armed criminal action.§571.015RSMo. The trial court imposed sentences of death and life without parole for at least three years. This Court has exclusive appellate jurisdiction.Mo.Const.,Art.V,§3.

[1] Statutory references are to Missouri Revised Statutes 2004.

STATEMENT OF FACTS[2]

This Court found, in *State v. McFadden*, 191 S.W.3d 648 (Mo.banc2006) and *State v. McFadden*, 216 S.W.3d 673 (Mo.banc2007), that the St. Louis County Prosecutor's Office purposefully discriminated by peremptorily challenging African-Americans, resulting in all-white juries. This case arises on retrial from the 2006 decision.

At the first trial, the State alleged Vincent killed Todd Franklin because he "was a witness in a past prosecution of Lorenzo Smith and Corey Smith for the robbery and assault of Todd Franklin and was killed as a result of his status as a witness."(LF366).[3] That jury did not so find.(LF374-75). Before opening statements at the second trial, counsel moved *in limine* to exclude all references to the Smiths, asserting the State was collaterally estopped from raising that issue. (T977-80). The Court overruled the motion and counsel's continuing objection. (T979-80,1110-11,1361-63,1365-72,1375-76,1395-96,1399,1575-76). The State called Mark Silas, Franklin's companion that night; William Goldstein, Lorenzo Smith's lawyer; Eva Addison and Evelyn Carter, and Larner read a letter from Vincent to Michael Douglas, to prove Vincent and Michael killed Franklin because he was a witness against the Smiths.(T1110-11,1361-75,1375-76,1395-

[2] Record references: Legal File—(LF_); Transcript—(T_); Exhibits—(Ex_).

[3] While the jury was instructed to find at least one statutory aggravator, the charging documents pled no aggravators.(LF26-30,38-41,276-78,315-20,456-59).

99,1575-76). Larner argued that Vincent killed Franklin because he was a witness against the Smiths.(T1745).

At the first trial, the State also charged the murder involved "depravity of mind" and told the jury it could only so find if it found Vincent killed Franklin "after he was bound or otherwise rendered helpless by defendant or another acting with or aiding the defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life."(LF366). That jury found the murder involved depravity of mind but did not find the narrowing language.(LF375). Here, the State again submitted the depravity aggravator over Vincent's collateral estoppels objection and argument.(T2349-51).

Counsel renewed all previously-filed motions(T2-8) and jury selection began. Approximately 14% of those called were African-Americans, with one Asian and the remainder Caucasians.(T921-24).[4] Assistant Prosecutor Larner successfully moved to strike for cause African-American Mark Kerr.(T440). Kerr believed in the death penalty, could sign the death verdict as foreperson, and could announce his verdict in open court.(T405-10). Larner stated Kerr hesitated "20 seconds" as he began to answer Larner's questions but acknowledged Kerr thoughtfully considered his answers.(T405). Kerr initially stated he would require

[4]African-Americans in St. Louis County comprise 21.6% of the population. 2006 United States Census Bureau(website accessed April 30, 2008; data last revised January 2, 2008).

proof greater than beyond a reasonable doubt "if that's the only choice you're giving me…"(T415), but then stated he would require nothing additional.(T438-39). Larner moved to strike Kerr because he hesitated 10-20 seconds before answering he could impose either punishment; wanted proof beyond that constitutionally-required, and believed sometimes the death penalty is not fairly administered.(T441-42). The Court sustained the cause strike, over objection.(T444-45).

Larner also moved to strike peremptorily all African-American veniremembers.(T921). Vincent raised *Batson* challenges, which the Court sustained except to Wanda Bryant.(T924-54). He granted Larner's peremptory strike of Bryant, finding Larner's reasons race-neutral.(T951-53).

Todd Franklin died in Pine Lawn on July 3, 2002, from five gunshot wounds.(T1490,1507). When Mark Silas, Franklin's companion, heard gunshots, he ran.(T1042-45). Silas did not recall identifying either shooter.(T1048-49). The Court admitted Exhibits 78-A and C, a tape-recording and transcript of an unsworn statement Silas made that night in which he identified Vincent as the second shooter.(T1096-1103). Silas continuously denied its veracity, saying he made it just to "get out of there" and "just said what they wanted to hear so I could go."(T1108,1118). The State also adduced that Silas identified Vincent from Vincent's photograph in the police station.(T1007, 1059-60, 1416, 1609). Despite Silas' repeated denials, Larner repeatedly asked if he feared Vincent. (T1045,1063,1071-1073).

Greg Hazlett, the Franklins' next-door neighbor, worked on his house on July 3, 2002, with Kent Rainey, Glenn Zackary and Gary Lucas.(T1190-91). About 6:15 p.m., Hazlett saw Franklin running across the empty lot across the street and two men following.(T1191). One man seemed to have a firecracker and another asked why Franklin was running.(T1192). Franklin entered Hazlett's yard and stood behind Hazlett, who was cutting siding.(T1192). The other two men, who Hazlett identified as Vincent and Michael Douglas, approached.(T1192). Franklin asked Hazlett for a job, a request Hazlett dismissed.(T1193). Hazlett headed toward his house, heard a shot, turned and saw Michael shooting Franklin.(T1193). Michael began to leave but stopped in the middle of the street, handed Vincent the gun, Vincent returned and shot Todd twice in the head.(T1193). Hazlett called the police and, later that night, identified Vincent as the second shooter.(T1200-07). Hazlett didn't accompany the police from the scene, sign the line-up identification, or make a taped statement because he didn't want to be labeled a snitch.(T1203-07). Hazlett later identified both Vincent and Michael from photo line-ups.(T1224-26).

Hazlett pled guilty to carrying a concealed weapon but, as a favor, in May, 2007, Larner opted not to charge him with DWI and weapon possession while intoxicated.(T1229). In July, 2002, Hazlett was charged with forcible rape and armed criminal action, which could have carried life sentences but, when the witness didn't appear, charges were dropped.(T1231-32)(*McFadden*, SC86857, LF436). Despite Larner's favorable treatment, Larner stated Hazlett had "no

reason to lie"(T1031-32) and "I don't care what Hazlett's criminal record or whatever. It's not that bad. I did him a favor. I didn't charge him with a DWI."(T1743).

Gary Lucas also worked on Hazlett's roof.(T1148). He heard what he thought was a firecracker and saw Franklin run toward the house, with Vincent and a man, later identified as Michael, behind him.(T1148). Someone threw a firecracker and someone asked Franklin why he was jumping.(T1148). When Franklin saw the workers, he, Michael and Vincent approached the house and asked Hazlett for jobs.(T1148). Hazlett declined and, when he went toward his house, told Lucas to watch them.(T1149). When Hazlett was inside his house, Michael pulled a gun, shot Todd and Vincent took Michael's gun and shot again. (T1149). Hazlett couldn't have seen the shootings because he was inside the house.(T1169-72).

After the shooting, Lucas ran, bought some liquor and went home.(T1151). Lucas stated "they" told him to go to Dallas until Vincent was caught.(T1152-53).

Glenn Zackary worked on the far side of the roof, (T1447),[5] and saw Franklin run into the yard, followed by two other young men.(T1449-51). He heard Franklin and someone else talking to Hazlett and saw another man beside a row of hedges.(T1451). He heard what he thought was fireworks and saw

[5] Zackary didn't appear and Larner read his testimony into the record. (T1428,1445).

Franklin on the ground.(T1452). He saw an exchange between the other two men, saw one walk into the yard and heard another two loud pops he assumed were gunshots.(T1453). One man ran east on Lexington and the second went through the vacant lot across the street.(T1454). Zackary then left.(T1454). Ten months later, he identified Vincent as the second shooter and Michael as the first.(T1455-60,1468-69).

Larner moved to exclude evidence that Michael pled to second-degree murder and received a 20-year sentence, arguing it was irrelevant.(T1578-79). Judge Ross limited Vincent to eliciting that Michael pled guilty to murder—without specifying the degree—and didn't receive the maximum punishment.(T1586-1588). Michael testified he shot Todd first, then handed the gun to Vincent, who shot again.(T1625-31). Michael acknowledged twice telling counsel Vincent wasn't the second shooter but he hadn't testified to that under oath because he didn't want to be charged with perjury.(T1638-40). On cross, Larner asked Michael to explain letters he exchanged with Vincent, including that he would "see the streets again sooner or later."(T1661). Michael testified that meant he had an out-date.(T1661). When counsel again requested permission to present Michael's plea to murder second and 20 years since Larner had opened the door, Judge Ross refused because mitigation was irrelevant in guilt phase.(T1694-95). Judge Ross then excluded the evidence in penalty phase.(T1809-14). In penalty phase closing, Larner argued, of the two shooters, Vincent was more

culpable since he was the "leader" who drew "others [including Michael] into his web of violence."(T2384).

In guilt phase closing, Larner told the jury to request all of Michael and Vincent's letters, although they might contain inadmissible evidence the judge wouldn't let them see.(T1726).[6] He repeatedly argued he believed his witnesses. (T1740,1743,1747). He argued, "I think you understand the mentality here. They don't think the way we think."(T1782).

The jury returned guilty verdicts.(T1799;LF623-24).

In penalty phase, Eva Addison, Leslie's sister, testified that Vincent had demanded she and Leslie "leave out of Pine Lawn,"(T1842-43),[7] Vincent and Leslie later argued,(T1845-48) and Vincent shot Leslie.(T1852-53). Eva testified that Vincent later threatened her if she implicated him.(T1864-66). Detective Hunnius testified, when he took crime scene photographs, he had to light the scene artificially since no street lights provided illumination.(T1971,1975). Stacy Stevenson, who overheard an argument, couldn't even see the body, much less who it was.(T1990-91).

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[6] Presumably, Larner was referring to the references in Exhibits 400,401,402, 407,409 to Vincent's murder convictions and death sentences having been reversed.

[7] A statement that Vincent was on the run for murder surfaced for the first time at this trial.(T1849).

On May 27, 2003, Eva took a phone call from "Slim" Dickens in which Vincent purportedly spoke to Slim as Slim and Eva spoke.(T1866). Larner played the tape and line-by-line, Eva testified to its contents.(T1867-73,1876-78).

Evelyn Carter spoke to Vincent the day after Leslie was killed and accused Vincent of killing Leslie.(T2001,2004). Vincent never admitted it and told Evelyn to help keep his name out of it.(T2002). Evelyn suspected Vincent because several months earlier, Leslie and Vincent had argued and scuffled.(T2005). Leslie went after Vincent they fought and Evelyn broke it up.(T2006). Vincent threatened to kill Leslie but later acted as if nothing had happened.(T2007-08).

When arrested in May, 2003, Vincent possessed crack cocaine.(T1910-14). Exhibits 101-104, Vincent's conviction records, were admitted.(T2024-32).

Patricia Franklin, Todd's mother, spoke to him the day he died.(T2035-36). She moved shortly thereafter because she feared for her daughter Tara's safety.(T2038-39). Patricia said losing Todd meant she would never see him again, never see grandchildren from him and the loss devastated the family.(T2054). Patricia didn't know that, when Todd died, he had cocaine in his pocket.(T2054-55).

Tara recalled Todd's supportiveness as she grew up, helping her with school and friends. (T2062-65). He also cared for their grandparents. (T2065,2068-70). Tara regretted never having nieces and nephews from Todd or grow old with him.(T2073). Candace Hosea, Todd's former girlfriend, testified he was happy, friendly and respectful.(T2057).

The Court gave Instruction 18 over objection that it violated the Notes on Use, it didn't require jury findings of "serious assaultive," and the State didn't adduce evidence of "serious assaultive."(LF654-55;T2343-61). In four separate numbered paragraphs, it instructed the jury consider whether Vincent had "serious assaultive convictions."(LF654).

Instruction 18 also instructed the jury consider whether the murder involved depravity of mind, if it found "the defendant killed Todd Franklin after he was bound or otherwise rendered helpless by defendant or another acting with or aiding the defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life."(LF654-55). The first jury was similarly instructed (LF366) but did not find the limiting construction.(LF375). The Court overruled counsel's objection.(T2349-50). The Instruction also did not clarify that "a finding of depravity of mind must be premised upon the acts and 'intent' of the defendant, not those of any other person." MAI-Cr3d314.40, Notes on Use 8.

The Court's Instructions 19 and 21,(LF656,658-60), told the jury to determine whether mitigators were sufficient to outweigh aggravators but never stated what burden of proof applied to non-statutory aggravators.(LF656). The Court overruled counsel's objections and refused Vincent's proposed instructions.(T2352-55).

In penalty phase closing, Larner personalized to the jury and argued everything was aggravating, including that Vincent wasn't retarded, wasn't abused, had no mental disease or defect, and isn't a juvenile.(T2389-90, 2405,

2407). He argued everyone hopes their siblings don't experience what Leslie and Todd did and they should consider that suffering.(T2413). He argued Vincent showed no remorse and, in the olden days, would have been hunted down, "like he deserves."(T2407,2409). He argued "hold" and "hug" Leslie and Todd, "tell them you love them," and don't "let them down."(T2414).

During penalty phase deliberations, the jury asked to see Exhibit 101 and asked, "Can either of our decisions be appealed?"(LF677). The Court responded, "…you are to be guided by the instructions of law as given by the Court."(LF678). Jurors also asked "If we decide that aggravating circumstances outweigh mitigating circumstances, how we report these on the form? I.E. Do we write the complete narration verbatim from Inst. #18 or do we just indiction (sic) #1, #2, etc. from Instruction 18?"(LF679). The Court responded, "…verbatim."(LF680).

The jury set Vincent's punishment at death, finding, as statutory aggravators, four "serious assaultive convictions"—assaults and armed criminal actions—and "the murder of Todd Franklin involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman."(LF685).

POINTS RELIED ON

I.Jury Precluded from Hearing Relevant Evidence

The trial court erred in precluding Vincent from eliciting that Michael Douglas pled guilty to second-degree murder and was sentenced to 20 years imprisonment because this denied Vincent due process, confrontation, a fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that the evidence was relevant to credibility and appropriate sentence, and, even if not initially relevant, in both phases, the State opened the door to Michael's testimony.

Delaware v. Van Arsdall, 475 U.S. 673 (1986);

United States v. Abel, 469 U.S. 45 (1984);

State v. Middleton, 998 S.W.2d 520 (Mo.banc 1999);

U.S.Const.,Amends.VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21.

II.State Gets Second Bite of the Apple

The trial court erred in overruling Vincent's objections to testimony of Mark Silas, William Goldstein, Eva Addison and Evelyn Carter, Exhibit 408, and opening and closing arguments, that Vincent killed Todd Franklin because Todd testified in a prior prosecution against Corey and Lorenzo, two of Vincent's friends, because these rulings denied Vincent due process, a fair trial, freedom from cruel and unusual punishment and freedom from being re-tried after once having been acquitted of that offense,U.S.Const.,Amends. VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),19, 21, in that, in the first trial, the jury rejected the statutory aggravator that Todd was a witness in a prior prosecution and was killed because he was a witness. That rejection constitutes an acquittal of that element of the offense and the State is estopped from seeking a different ruling from a second jury and forcing Vincent to re-run the gantlet.

Ashe v. Swenson, 397 U.S. 436 (1970);

State v. Whitfield, 107 S.W.3d 253 (Mo.banc 2003);

Capano v. State, 889 A.2d 968 (Del. Supr. 2006);

U.S.Const.,Amends.VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),19,21.

III.Court Improperly Grants State's Cause Strike

The trial court abused his discretion in granting the State's challenge for cause of Venireperson Mark Kerr because this denied Vincent due process, a fair, impartial jury and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21 in that Kerr's responses revealed he could apply the law by considering both punishments and not requiring the State to prove its case by greater than beyond a reasonable doubt. His hesitation in answering questions merely revealed his deliberate nature, not an inability to follow the law.

Wainwright v. Witt, 469 U.S. 412 (1985);

Gray v. Mississippi, 481 U.S. 648 (1987);

State v. Taylor, 18 S.W.3d 366 (Mo.banc 2000);

U.S.Const.,Amends.VI,VIII,XIV;

Mo.Const.,Art.I,§§5,10,18(a),21.

IV.Court Improperly Denies Vincent's *Batson* Challenge

The trial court clearly erred in overruling Vincent's *Batson* objection to the State's peremptory strike of African-American Venirewoman Wanda Bryant because that action denied Vincent and Bryant equal protection and Vincent due process, a fair, impartial jury, and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I, §§2,10,18(a),21, in that Vincent challenged the State's strike, identified Bryant as African-American, and showed the State's purported reasons—that Bryant would require proof beyond all doubt, leans toward life and hesitated 20 seconds when asked if she could consider death—were pretextual. The State asked Bryant this question first and, since she had never heard it before, some hesitation was not unusual; Bryant clearly stated she could impose either penalty, announce her verdict in open court and sign the death verdict, and, with his peremptories, the prosecutor sought to remove all remaining African-Americans. Only because the court sustained Vincent's *Batson* challenges to the other three peremptories lodged against African-Americans was Vincent's jury not all-white.

Batson v. Kentucky, 476 U.S. 79 (1986);

Miller-El v. Dretke, 545 U.S. 231 (2005);

State v. McFadden, 216 S.W.3d 673 (Mo.banc 2007);

U.S.Const.,Amends.VI,VIII,XIV;

Mo.Const., Art.I, §§2,10,18(a),21.

V.State's Case Rife With Other Crime Evidence

The trial court erred, plainly erred, and abused its discretion in admitting in guilt phase through Larner's opening statement, Mark Silas', Officer Menzenwerth's and Officer Stone's testimony that Silas identified Vincent from a photograph in the station, and Heather Burke's testimony that she compared Vincent's fingerprints to those in the "master file" because this denied Vincent due process, a fundamentally fair trial, trial for the charged offenses, and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,17,18(a),21, in that this testimony encouraged the jury to convict Vincent of the charged offenses based on evidence and innuendo that he had committed and would still commit other crimes rather than solely on the evidence about this crime.

United States v. Mejia-Uribe, 75 F.3d 395 (8th Cir.1996);

State v. Bernard, 849 S.W.2d 10 (Mo.banc 1993);

State v. Clark, 112 S.W.3d 95 (Mo.App.,W.D.2003);

U.S.Const.,Amends.VI,VIII,XIV;

Mo.Const.,Art.I,§§10,17,18(a),21.

VI.Instruction 18 Violates Notes on Use

The trial court erred in overruling Vincent's objections and submitting Instruction 18, patterned after MAI-CR3d 314.40, because that denied Vincent due process, a properly-instructed jury, and freedom from cruel and unusual punishment,U.S.Const., Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10, 18(a), 21, in that, contrary to the Notes on Use, the Instruction submitted, as separate numbered paragraphs, Vincent's first degree assault and armed criminal action convictions. Vincent was prejudiced because, when the jury weighed aggravators and mitigators, it was encouraged to believe more aggravators were on the "death" side of the scales and death was the appropriate punishment.

State v. Taylor, 134 S.W.3d 21 (Mo.banc 2004);

State ex rel. Vee-Jay Contracting Co. v. Neill, 89 S.W.3d 470 (Mo.banc 2002);

Ristau v. DMAPZ, 130 S.W.3d 602 (Mo.App.,W.D. 2004);

U.S.Const.,Amends.VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21.

VII. Instruction 18 Penalizes Vincent for Another's Conduct

The trial court erred and plainly erred in submitting Instruction 18 and accepting the jury's death verdict because that denied Vincent due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21 in that the "depravity of mind" aggravator submitted in Instruction 18 let the jury sentence Vincent to death based on Michael Douglas's conduct.

Lockett v. Ohio, 438 U.S. 586 (1978);

State v. Isa, 850 S.W.2d 876 (Mo.banc 1993);

State v. Hutchinson, 957 S.W.2d 757 (Mo.banc 1997);

U.S.Const.,Amends.VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21.

VIII.Instruction 18: Jury Doesn't Find Limiting Construction

The trial court erred and plainly erred in accepting the jury's death verdict and sentencing Vincent to death because this denied Vincent due process, a fair trial, reliable jury sentencing and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I, §§10,18(a),21, in that although the jury was instructed it could find that the "murder of Todd Franklin involved depravity of mind" only if it found "that the defendant killed Todd Franklin after he was bound or otherwise rendered helpless by defendant or another acting with or aiding the defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life," and Judge Ross specifically directed the jury to write out the statutory aggravators they found "verbatim," the jury did not find the limiting construction.

Alternatively, if this Court believes the jury found the limiting construction, it is void for vagueness because, if the victim is deemed "rendered helpless" by one shot, the limiting construction would apply to any case involving more than one shot or blow. Because the jury's death verdict was based upon its finding that mitigators did not outweigh aggravators, its improper consideration of this aggravator skewed its decision toward death.

Ring v. Arizona, 536 U.S. 584 (2002);

Godfrey v. Georgia, 446 U.S. 420 (1980);

Newlon v. Armontrout, 885 F.2d 1328(8th Cir. 1989);

U.S.Const.,Amends.VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21.

IX.Instruction 18: Prior Jury Didn't Find Aggravator

The trial court erred in overruling Vincent's objections, submitting Instruction 18 and accepting the jury's death verdict because that denied Vincent due process, a properly-instructed jury, freedom from cruel and unusual punishment and from twice being tried for the same offense, U.S. Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),19,21, in that the jury in Vincent's original trial did not find the limiting construction of the "depravity of mind" aggravator and thus rejected it.

Ashe v. Swenson, 397 U.S. 436 (1970);

Poland v. Arizona, 476 U.S. 147 (1986);

Capano v. State, 889 A.2d 968 (Del. Supr. 2006);

U.S.Const.,Amends.VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),19,21.

X.Instruction 18: Jury Doesn't Make "Serious Assaultive Finding

The trial court erred in overruling Vincent's objections to Instruction 18, in submitting that Instruction, and in accepting the jury's death verdict based, at least in part, upon its findings of four statutory aggravating circumstances that purport to be "serious assaultive convictions," because this violated Vincent's rights to due process, a properly-instructed jury, jury sentencing, and freedom from cruel and unusual punishment, U.S.Const., Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that, (a) although the Instruction purported to leave to the jury the task of determining the factual question of whether the convictions were "serious assaultive," it didn't submit the "serious assaultive" facts of the convictions to the jury and (b) there was insufficient evidence upon which a finding of "serious assaultive" convictions could be based.

Apprendi v. New Jersey, 530 U.S. 466 (2000);

Shepard v. United States, 544 U.S. 13 (2005);

State v. Schlup, 724 S.W.2d 236 (Mo.banc 1987);

U.S.Const., Amends.VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21.

XI.Instructions 19 & 21 Violate *Ring, Apprendi* & *Whitfield*

The trial court erred in submitting Instructions 19 and 21 over objection, rejecting Instructions B-E, which would have cured those errors, and admitting over objection evidence of non-statutory aggravators, because those actions denied Vincent due process, a properly-instructed jury, appellate review, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21 in that Instructions 19 and 21 place the burden of proof on the defense; don't require the State to prove this eligibility step beyond a reasonable doubt; are contrary to §565.030RSMo by requiring the jury unanimously find mitigators outweigh aggravators to impose life; let the jury consider constitutionally-impermissible evidence in aggravation of punishment; and insulate the jury's decision from appellate review by not requiring written findings on this step and the jury likely considered the evidence adduced and considered under those instructions in deciding penalty phase.

Ring v. Arizona, 536 U.S. 584 (2002);

State v. Whitfield, 107 S.W.3d 253 (Mo.banc2003);

Jackson v. Virginia, 443 U.S. 307 (1979);

U.S.Const.,Amends.VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21.

XII. State's Arguments Violate Due Process

The trial court erred and abused his discretion in overruling Vincent's objections and denying his mistrial requests and plainly erred in not declaring a mistrial based on the prosecutor's arguments telling jurors in:

Voir Dire

1. **He worked for McCulloch, the elected prosecutor, for whom they may have voted;**
2. **Their answers didn't matter;**
3. **For a life without parole result, the jury must be unanimous;**
4. **Referred to other cases in which the State lacked evidence.**

Guilt Phase Opening

1. **Mark Silas identified Vincent from a photo in the police station;**
2. **Larner's witnesses have "no reason to lie;"**
3. **Reads from letters in Michael's cell.**

Guilt Phase Closing

1. **Referred to evidence that hadn't been admitted and encouraged jurors to request inadmissible evidence during deliberations;**
2. **Suggested Vincent's rights to a jury trial and confrontation of Michael Douglas were "B.S.;"**
3. **Referred to and encouraged jurors to feel how a .44 gun is fired although no evidence was presented about it and ignored the court's initial ruling;**

4. **Vouched for Hazlett's testimony and misled the jury about his criminal record;**
5. **Encouraged the jury to ignore evidence and vouched for the truth of out-of-court statements;**
6. **Called Vincent and his co-defendant "cold-blooded killers;"**
7. **Suggested defense counsel did not want the people of St. Louis County to convict someone of murder or protect its citizens;**
8. **"You represent St. Louis County.";**
9. **Suggested a lesser-included offense was absurd, contrary to the law;**
10. **Denigrated Vincent, saying he treated Franklin like an animal;**
11. **Aligned himself with jurors and against Vincent, saying "they don't think the way we think.";**
12. **Told jurors he had reasonable doubt about some evidence but it didn't matter;**
13. **Vouched for Lucas' credibility.**

<u>Penalty Phase Closing</u>

1. **Told jurors Vincent treated Franklin like an animal and doesn't believe in the sanctity of human life;**
2. **Told jurors he didn't find anything mitigating in the evidence and they should thus ignore it;**
3. **Personalized that he felt the Addison killing warranted the death penalty;**

4. **Argued future dangerousness, that Vincent would kill again;**
5. **Personalized to jurors and equated their function with witnesses, whose lives, he said, were at risk from Vincent;**
6. **Argued outside the evidence that Vincent was the leader and dragged Michael Douglas into this crime;**
7. **Expanded the scope of victim impact past the victims of this offense;**
8. **Made emotionally-charged statements designed to ensure the jurors ignored the law;**
9. **Likened Vincent to an animal and worse, saying he killed for power, control, status and pleasure;**
10. **Stated Vincent's lack of a mental disease or defect is aggravating;**
11. **Stated that Vincent has a supportive family is aggravating;**
12. **Stated Vincent's lack of mental retardation is aggravating;**
13. **Stated Vincent's capacity to know right from wrong is aggravating;**
14. **Stated because Vincent wasn't sexually abused, it was aggravating;**
15. **Stated Vincent believes in the death penalty;**
16. **Stated Vincent showed no remorse;**
17. **Denigrated Vincent's constitutional rights, saying he deserved to be hunted down and killed by Franklin's family;**
18. **Told jurors that they represent the community;**

19. Personalized to the jury, asking them to think of the terror Leslie and Todd experienced and telling the jury to hold and hug them and not let them down

because these arguments denied Vincent due process, a fair trial, reliable sentencing, freedom from cruel and unusual punishment,U.S.Const.,Amends. VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),19,21, in that Larner injected his personal beliefs; discounted veniremembers' responses; misstated the facts and law; injected facts not in evidence; injected evidence of other crimes; personalized to the jury; exceeded the scope of proper victim impact; vouched for witnesses' credibility; denigrated defense counsel; utilized epithets; injected heightened emotion; converted mitigators into aggravators, and commented on Vincent's right not to testify.

Donnelly v. DeChristoforo, 416 U.S. 637 (1974);

Shurn v. Delo, 177 F.3d 662 (8th Cir. 1999);

State v. Storey, 901 S.W.2d 886 (Mo.banc 1995);

U.S.Const.,Amends.VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21.

XIII."Slim and Eva" Audiotape: Hearsay and Foundation Challenge

The trial court clearly erred and abused its discretion in overruling Vincent's objections and admitting State's Exhibit 148-B, the recording of a phone conversation between Eva and Slim, and State's Exhibit 148-C, the transcript, because the rulings denied Vincent due process, confrontation and cross-examination, fair and reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I, §§10,18(a), in that (1) the State didn't lay a proper foundation to admit the exhibits, since it didn't establish Eva could hear everything Vincent stated, without Slim repeating it, and hence didn't establish (a) the recording's authenticity and correctness; (b) that no changes, additions, or deletions were made; (c) how the recording was preserved; and (d) the speakers' proper identification; and (2) the recording contained impermissible hearsay, because it contained Slim's assertions about what Vincent said, yet Slim did not testify.

State v. Fletcher, 948 S.W.2d 436 (Mo.App.,W.D.1997);

State v. Wahby, 775 S.W.2d 147 (Mo.banc1989);

State v. Black¸50 S.W.3d 778 (Mo.banc2001);

U.S.Const.,Amends.VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21.

XIV.Capital Offense Not Charged: *Apprendi* Violations

The trial court erred in overruling Vincent's pre-trial *Apprendi* motions; not quashing the information; proceeding to penalty phase; accepting the jury's verdict and sentencing Vincent to death because this denied Vincent due process, a jury trial, reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV, Mo.Const.,Art.I,§§10,18(a),21, in that statutory and non-statutory aggravators are facts increasing the range of punishment for first degree murder from life without parole to death that must be pled in the charging document and found by the jury unanimously beyond a reasonable doubt.

Ring v. Arizona, 536 U.S. 584 (2002);

United States v. Cotton, 535 U.S. 625 (2002);

State v. Nolan, 418 S.W.2d 51 (Mo.1967);

U.S.Const.,Amends.VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21.

ARGUMENTS

I.Jury Precluded from Hearing Relevant Evidence

The trial court erred in precluding Vincent from eliciting that Michael Douglas pled guilty to second-degree murder and was sentenced to 20 years imprisonment because this denied Vincent due process, confrontation, a fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const., Art.I,§§10,18(a),21, in that the evidence was relevant to credibility and appropriate sentence, and, even if not initially relevant, in both phases, the State opened the door to Michael's testimony.

Michael Douglas shot Todd Franklin in the head, fatally wounding him, (T1507,1515-16), and then gave the gun to Vincent, who shot again. Although the State made a deal with Michael for a guilty plea to second-degree murder and a 20-year sentence, the State successfully precluded Vincent's jury from hearing the results of Michael's case. This violated Vincent's state and federal constitutional rights to due process, confrontation, a fair trial, reliable sentencing and freedom from cruel and unusual punishment.

A trial court's discretion in admitting or excluding evidence is limited and is reviewed for an abuse of discretion.*State v. Forrest*, 183 S.W.3d 218, 223(Mo.banc2006). An abuse of discretion is shown when the court's ruling is against the logic of the circumstances and is so unreasonable it indicates a lack of careful consideration.*Id.*; *State v. Gonzales*, 153 S.W.3d 311, 312(Mo.banc 2005).

If admissible evidence is excluded, a rebuttable presumption of prejudice is created and the State must show it was harmless beyond a reasonable doubt. *State v. Barriner*, 111 S.W.3d 396, 401(Mo.banc2003); *State v. Sanders*, 126 S.W.3d 5, 22-23(Mo.App.,W.D.2003).

When a court excludes evidence based on relevance, the question becomes: was the evidence logically and legally relevant? *State v. Anderson*, 76 S.W.3d 275, 276(Mo.banc2002); *State v. Sladek*, 835 S.W.2d 308, 314(Mo.banc1992) (Thomas, J., concurring). Evidence is logically relevant if it tends to make a material fact's existence more or less probable. *Anderson*, 76 S.W.3d at 276. It is legally relevant if its probative value outweighs its costs—unfair prejudice, issue confusion, misleading the jury, undue delay, waste of time or cumulativeness.*Id.*

Even if not initially admissible, evidence may become so when the opposing party opens the door.*Barnett v. State*, 103 S.W.3d 765, 772-73 n.5 (Mo.banc2003); *U.S. v. Durham*, 868 F.2d 1010, 1012(8thCir.1989). A party may thus explore otherwise inadmissible evidence when another party has made unfair, prejudicial use of it. *Id.*; *U.S. v. Lum*, 466 F.Supp. 328, 334(D.Del.), *aff'd without opinion*, 605 F.2d 1198(3rdCir.1979).

In guilt phase, Larner argued that the defense should be precluded from presenting evidence about Michael Douglas's plea and sentence.(T1578). Larner stated Michael received nothing for his testimony and thus, charge and sentence were irrelevant.(T1579). But, Michael stated he implicated Vincent solely to get

the 20 years and, if he testified Vincent wasn't the second shooter, his fears about perjury made charge and sentence relevant.(T1579).

Judge Ross stated that if Michael testified for a deal, the deal could be relevant but the sentence wasn't.(T1580).

> The fact that he pled guilty and got a plea agreement may be relevant. The term of imprisonment, I don't see any relevance to it. The fact that he can be charged with perjury and get a life term may be relevant. And you can certainly inquire of him if he's aware of that. But what his term of imprisonment is not relevant. The fact that he pled guilty to murder in the second degree as opposed to murder in the first degree I don't believe is relevant. The fact that he pled guilty to murder may be relevant and is admissible.

(T1582-83). He sustained the State's motion and said if the plea agreement were for testimony, "the term of imprisonment, the degree of the benefit, would be admissible."(T1584). He told counsel they could elicit only that Michael didn't get the maximum punishment and pled guilty to murder.(T1586,1588).

Michael testified he shot Franklin after one of Franklin's cohorts shot at him and Vincent and he thereafter gave his gun to Vincent, who shot Franklin again.(T1625-31). On February 7, 2007, Michael told counsel his brother, not Vincent, was the second shooter.(T1631-32). And, he told counsel and Larner in April, 2007, that Vincent wasn't the second shooter.(T1633-35). Michael never stated under oath that Vincent wasn't the second shooter because, after his guilty

plea, he didn't want to be charged with perjury.(T1638-40). When he pled guilty, he did not receive the maximum sentence.(T1640).

On cross, Michael discussed his plea and said he lied when he stated his brother was the second shooter.(T1648). The following exchange occurred:

Larner: The time you wrote that letter, that's what you were going to come into court and say?

Michael: No, sir.

Larner: Well, you wrote that letter saying that Kyle was the second shooter. Is that correct?

Michael: I just said that because I don't think it's fair that you putting all the weight on him.

Larner: I didn't ask you what was fair. I asked you a question.

(T1648-49).

Larner then asked Michael about letters they exchanged.(T1658-59).

Larner: And what did you mean by "I'll put some of the weight on my shoulder to take the weight of the world off yours?"

Michael: I mean, I'm—I know what I did and I'm telling what I did.

Larner: All right. Now, would it—did you state that, "We gonna see the streets again sooner than later"? What did you mean by that?

Michael: I mean, I got an out date.

(T1660-61).

After Michael testified, counsel made an offer of proof about Michael's admission that he implicated Vincent solely to get the murder second and 20-year deal.(T1686). Counsel asked Judge Ross to reconsider his earlier ruling.(T1687). Counsel noted Larner had elicited this testimony.(T1689). Larner countered that he believed counsel had sufficiently presented the issue.(T1689-91). Counsel countered the jury didn't necessarily know what Michael's testimony about having an "out-date" meant.(T1691).

Judge Ross refused to alter his earlier ruling, finding "the extent of the bargain, that he got 20 years on murder second, is not relevant."(T1694). Judge Ross noted, "the only reason, from the Court's view, that you would want to ask about the 20 years on murder second would be to mitigate punishment. And if you want to, if we reach a punishment phase, get into that, we can talk about that, because it may be relevant in a penalty phase to mitigate the punishment. But it's not relevant on the truthfulness or bias or prejudice of this witness. The only thing that affects the truthfulness goes to the credibility of bias or prejudice of the witness is that he got a benefit, which is the plea bargain … So there is no reason for the Court to reverse its ruling."(T1694-95).

Before penalty phase, Larner again moved to preclude the defense from eliciting evidence about Michael's conviction and sentence.(T1809). Relying on *Edwards v. State*, 200 S.W.3d 500(Mo.banc2006), the court sustained Larner's motion. As to guilt phase, "It was, in my view, proper inquiry in questioning the codefendant because it went to his credibility and believability. It's a different

issue here, because the codefendant's credibility and believability is not an issue for the jury in punishment phase. And so I don't believe that it's relevant." (T1811). When counsel proposed arguing, as mitigation, Michael received a plea deal and a lesser sentence, without mentioning the 20-years, the court again ruled against Vincent.(T1812-14).

After the parties presented their cases, counsel requested the court reconsider his ruling.(T2334-35). The court ruled Michael's sentence was irrelevant.(T2337-38).

In closing, Larner argued that Vincent was the leader, the person who drew Michael into his world of violence.(T2384).

Vincent preserved in his new trial motion the exclusion in both phases of evidence about Michael's conviction and 20-year sentence.(LF688-91).

Guilt Phase

Evidence tending to show a witness's bias, prejudice or motive to lie is so significant it is never collateral but is exculpatory and can be established either through extrinsic proof or impeachment.*U.S. v. Abel*, 469 U.S. 45, 52(1984); *State v. Hedrick*, 797 S.W.2d 823, 827(Mo.App.,W.D.1990). Prohibiting a criminal defendant from examining a witness on "relevant evidence of bias and motive may violate the Confrontation Clause, if the jury is precluded from hearing evidence from which it could appropriately draw adverse inferences on the witness's credibility."*U.S. v. Turner*, 198 F.3d 425, 429(4thCir.1999); *Delaware v. Van Arsdall*, 475 U.S. 673, 680(1986). Witnesses may be cross-examined about

anything that might motivate them to distort or exaggerate the facts. *State v. Ofield*, 635 S.W.2d 73,75(Mo.App.,W.D.1982). The right of cross-examination is essential and indispensable.*State v. Jaynes*, 949 S.W.2d 633,635(Mo.App., E.D.1997)

Although Michael's plea was not for testimony, his plea to second-degree murder and 20-year sentence was admissible to show bias or motive to lie. Michael's motive to curry favor with the State—continuing to finger Vincent as the second shooter—to create an enhanced opportunity for parole-eligibility was something the jury should have been allowed to consider.*State v. Scott*, 608 N.W.2d 753, 760(Wis.App.2000).

Even were Michael's conviction and sentence generally irrelevant in guilt phase, Judge Ross erred in excluding it since Larner opened the door. On cross-examination, Larner asked Michael to explain letters found in his cell:

> Larner: And **what did you mean by** "I'll put some of the weight on my shoulder to take the weight of the world off yours?"…
>
> Larner: All right. Now, would it—did you state that, "We gonna see the streets again sooner than later?" **What did you mean by that**?
>
> Michael: I mean, I got an out date.

(T1660-61)(emphasis added). This was not, as Larner later asserted, a witness "spitting out," volunteering, that he had an out-date.(T1689-91,1694). When Larner asked Michael **what he meant**, Michael merely responded to the question. His response wasn't volunteered but was actively elicited. Once Larner opened

the door, even if theretofore inadmissible, Vincent should have been allowed to explore the response so the jury could hear what Michael meant. *State v. Middleton*, 998 S.W.2d 520,528(Mo.banc1999); *United States v. Durham*, 868 F.2d 1010,1012(8thCir.1989).

Penalty Phase

In guilt phase, Judge Ross stated Michael's conviction and sentence were irrelevant for credibility or bias but might be relevant for mitigation in penalty phase.(T1694-95). He then flip-flopped, stating it would have been relevant in guilt phase for credibility and bias but was irrelevant in penalty phase as mitigation.(T1811). He based his penalty phase denial on *Edwards v. State*, 200 S.W.3d 500(Mo.banc2006).(T1811,2334-38). In closing, Larner compared Michael and Vincent, arguing Vincent was more culpable, influencing Michael to follow a life of crime.(T2384). Larner argued Vincent should receive death because

> he draws others into his web of violence. Look who he drew in: Michael Douglas, 16 years old at the time. He's 22. … So he ruins Michael Douglas's life as well…He's the strong man. He's the leader in this killing. He's the one.

(T2384).

Capital defendants must be allowed to introduce any relevant mitigating evidence about their character or record and any of the circumstances of the offense. That evidence is constitutionally-indispensable to the process of deciding

whether to impose death.*California v. Brown*, 479 U.S. 538(1987). "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose" death.*McCleskey v. Kemp*, 481 U.S. 279, 306(1987). This Court declined to hold a co-defendant's sentence is relevant mitigation evidence. *Edwards*, 200 S.W.3d at 511. *Edwards* is distinguishable since there, the co-defendant never testified and his credibility was not at issue. Alternatively, Vincent requests this Court re-visit *Edwards* and find, under *Parker v. Dugger*, 498 U.S. 308(1991), such evidence may not be excluded.

Alternatively, Larner's argument comparing Michael and Vincent's relative culpability opened the door to this evidence.[8]*Durham*, 868 F.2d at 1012. Although courts have authority "to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense," *Lockett v. Ohio*, 438 U.S. 586, 604 n. 12(1978), Larner put Michael's conviction and sentence in play by comparing their culpability. The jury should have been allowed to consider Michael's second-degree murder and 20-year sentence in deciding whether, on the facts and the differences between the two men—one 16, the initial, fatal shooter; the other 22, firing again—Vincent deserved death.

[8] Counsel did not then move to re-open the evidence but, given Judge Ross's adamance that the evidence was irrelevant, it would have been futile. See, *Brooks v. State*, 51 S.W.3d 909, 914(Mo.App.,W.D.2001);*Redeemer v. State*, 979 S.W.2d 565, 572(Mo.App.,W.D.1998).

This Court should reverse and remand for an entire new trial.

II.State Gets Second Bite of the Apple

The trial court erred in overruling Vincent's objections to testimony of Mark Silas, William Goldstein, Eva Addison and Evelyn Carter, Exhibit 408, and opening and closing arguments, that Vincent killed Todd Franklin because Todd testified in a prior prosecution against Corey and Lorenzo, two of Vincent's friends, because these rulings denied Vincent due process, a fair trial, freedom from cruel and unusual punishment and freedom from being re-tried after once having been acquitted of that offense,U.S.Const., Amends. VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),19, 21, in that, in the first trial, the jury rejected the statutory aggravator that Todd was a witness in a prior prosecution and was killed because he was a witness. That rejection constitutes an acquittal of that element of the offense and the State is therefore estopped from seeking a different ruling from a second jury and forcing Vincent to re-run the gantlet.

The 2005 jury rejected the State's theory that Vincent killed Todd Franklin because Franklin was a witness in a prior prosecution. Nonetheless, the State used the same evidence in this prosecution to convict. Because the first jury's decision is an acquittal—a merits ruling—on that element of the State's case, and the parties and issues are the same, the State was collaterally estopped from presenting this evidence to this second jury and forcing Vincent to re-defend against these accusations. Judge Ross's rulings violated Vincent's state and federal

constitutional rights to due process, a fair trial, freedom from cruel and unusual punishment and twice being tried for the same offense.

In the first trial, the State charged Vincent killed Franklin because he was a witness in a prior prosecution. The jury had to decide unanimously beyond a reasonable doubt, "whether Todd Franklin was a witness in a past prosecution of Lorenzo Smith and Corey Smith for the robbery and assault of Todd Franklin and was killed as a result of his status as a witness."(LF366). The jury rejected that aggravator.(LF375). That failure to find the statutory aggravator should have precluded the State from submitting that issue here.

Collateral estoppel is part of the Fifth Amendment's guarantee against double jeopardy, *Ashe v. Swenson*, 397 U.S. 436, 445(1970), which extends to the States through the Fourteenth Amendment.*Benton v. Maryland*, 395 U.S. 784, 794(1969); Mo.Const.,Art.I,§19. "When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443. The "first trial [cannot be treated] as no more than a dry run for the second prosecution."*Id.* at 447. That is "precisely what the constitutional guarantee forbids."*Id.*

In *Ashe*, the State prosecuted Petitioner for the armed robbery of one of six poker players. Following his acquittal, the State prosecuted him for the armed robbery of another player. The "single rationally conceivable issue in dispute before the jury" in the first prosecution was whether Petitioner was one of the robbers. *Id.* at 445. By acquitting him, the first jury found he was not. *Id.* The

State could not retry that issue or force Petitioner to "run the gantlet" again. *Id.* at 445-46.

This Court has applied *Ashe*'s rationale. Collateral estoppel applies if: (1) the issue in the case is identical to the issue decided in the prior proceeding; (2) there was a judgment on the merits in the prior adjudication; (3) the party against whom collateral estoppel is asserted is the same or is in privity with a party in the prior proceedings, and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceedings.*State v. Nunley*, 923 S.W.2d 911, 922(Mo.banc 1996). All four prongs are satisfied here.

Vincent's first jury rejected the statutory aggravator that Franklin was killed because he was a witness in a prior prosecution.(LF374-75). While the State did not re-submit that aggravator, it nonetheless violated *Ashe*. Despite repeated objections, it permeated guilt phase argument and testimony that Vincent killed Franklin because he was a witness against Vincent's friends, Corey and Lorenzo Smith.

Pre-trial, counsel moved to preclude the State from presenting that this killing was related to Corey and Lorenzo's cases.(T977). The court overruled counsel's continuing objection, admitting the evidence.(T978-81).

Larner argued that, in 2001, Franklin testified against Vincent's "buddies," Corey and Lorenzo, who were then convicted and sentenced.(T993-94). He argued Vincent "wasn't going to let that go" and he and Michael Douglas therefore killed Franklin.(T994-95). After Franklin's death, Vincent intimated to

Evelyn Carter he killed Franklin because "he snitched on my home boys."(T1031). Larner read Vincent's letter to Michael and argued the motive in this case was Lorenzo and Corey.(T1038).

Mark Silas testified he heard Franklin was "a victim of Corey and Lorenzo Smith."(T1110). Upon objection, Larner said he would move on.(T1111). Larner called William Goldstein, Lorenzo's lawyer.(T1363). Counsel lodged a continuing objection, arguing the first jury's rejection of the statutory aggravator should preclude this evidence.(T1361). The Court overruled the objection, ruling that, although the jury did not find as an aggravator that Franklin was killed because he was a witness, the evidence was relevant, admissible and not collaterally estopped.(T1362).

Goldstein testified Franklin was deposed and implicated Corey and Lorenzo, who pled guilty and were sentenced based on his testimony.(T1365-68). Goldstein testified Franklin "testified credibly" and Lorenzo pled guilty partially because of it.(T1371-72).

Eva Addison testified that Corey and Lorenzo were Vincent's friends.(T1375-76). Evelyn Carter testified that Vincent, Corey and Lorenzo were friends and Vincent intimated he killed Franklin because Franklin told on his "homies," who Carter assumed were Lorenzo and Corey.(T1395-96,1399). Larner offered Exhibit 409, a letter to Michael Douglas, "You must make sure you don't say anything about Zo N Corey in this case at all."(T1575-76;Ex409).

In closing, Larner argued Silas was afraid to testify because Vincent killed his friend because he testified against Vincent's friends.(T1745,1789). "That's the motive."(T1789).

Counsel challenged Larner's intent to adduce this evidence pre-trial, lodged contemporaneous objections, and preserved objections in the new trial motion.(LF692,701). A trial court's decision to admit evidence will be reversed for an abuse of discretion.*State v. Davis*, 226 S.W.3d 167, 169(Mo.App.,W.D. 2007). Reversal is warranted if the improperly-admitted evidence prejudiced the defendant.*Id.* Although trial courts' evidentiary rulings require deference from appellate courts, misapplications of law warrant none.*Ryan v. Ford*, 16 S.W.3d 644, 648 (Mo.App.W.D.2000). There, review is *de novo*.*Id.* Reversal is warranted here since Judge Ross misapplied the law, believing collateral estoppel was inapplicable.

The first jury's failure to find the statutory aggravator that Franklin was killed because he was a witness against Corey and Lorenzo is an acquittal of that aggravator.*State v. Whitfield*, 107 S.W.3d 253(Mo.banc2003); *Apprendi v. New Jersey*, 530 U.S. 466(2000); *Ring v. Arizona*, 536 U.S. 584(2002); *Capano v. State*, 889 A.2d 968(Del. Supr.2006)(failure unanimously beyond a reasonable doubt to find a statutory aggravator constitutes an acquittal of that aggravator); *State v. Silhan*, 275 S.E.2d 450, 480-83(N.C. 1981)(determination an aggravator doesn't apply is analogous to the determination the accused wasn't guilty of an offense).

The Sixth Amendment requires that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."*Jones v. United States*, 526 U.S. 227, 243 n.6(1999). In *Ring*, the Court re-emphasized a statutory aggravator's determinative effect. 536 U.S. at 62(citations omitted). Regardless of its label, any finding of fact:

> must be found by a jury beyond a reasonable doubt. A defendant may not be "expose[d] … to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone…."

Id. Because statutory aggravators are "'the functional equivalent of an element of a greater offense,' … the Sixth Amendment requires that they be found by a jury."*Id.* at 609, citing *Apprendi*, 530 U.S. at 494 n.19. This Court has acknowledged *Ring* and *Apprendi*'s applicability to capital cases—juries must find all eligibility factors unanimously beyond a reasonable doubt.*Whitfield*, 107 S.W.3d at 256. The logical corollary is, if those factual findings are **not** made unanimously beyond a reasonable doubt, the defendant is acquitted of that element of the offense.

The first jury did not unanimously beyond a reasonable doubt find Vincent killed Franklin because he was a witness against Corey and Lorenzo. Thus, there was a merits ruling on that issue.*Nunley*, 923 S.W.2d at 922. The parties in both cases are identical—Vincent, counsel, and the St. Louis County Prosecutor's Office. *Id.* The State, which offered the statutory aggravator, had a full and fair

opportunity to litigate the issue in the prior proceeding.*Id.* Judge Ross's ruling suggests collateral estoppel does not apply because the issue in both cases is not identical.*Id.* The record demonstrates otherwise.

Larner began and ended his case by arguing Vincent killed Franklin because Franklin testified against Vincent's friends.(T993-94,1031,1037,1745,1789). Through Mark Silas, William Goldstein, Eva Addison and Evelyn Carter, he pushed this theme home.(T1110-11,1361-71,1375-76,1395-96,1398-99,1575). Larner then tied witnesses' failures to implicate, appear and testify consistently to Vincent, creating the picture of him as one who would do anything to eliminate witnesses.(T1045,1063,1071,1073,1153,1744, 1752,1785-86). Larner presented the identical factual issue to this jury.

The first jury's decision was a merits ruling, an acquittal of the "witness in a prior prosecution" statutory aggravator. Under *Bullington v. Missouri*, 451 U.S. 430 (1981), since this "capital sentencing procedure that resembles a trial on the issue of guilt or innocence … *explicitly requires* the jury to determine whether the prosecution has 'proved its case,' *Bullington*, 451 U.S. at 444(emphasis in original), the State should have been precluded from using that aggravator again since its use 'forced [Vincent] to run the gantlet' again…."*Id.* at 443, quoting *Green v. United States*, 355 U.S. 184, 190(1957).

Whitfield, *Ring* and *Apprendi* compel this result. They also compel a re-thinking of *Poland v. Arizona*, 476 U.S. 147(1986).

In *Poland*, following guilt phase, the trial judge-sentencer heard evidence on two statutory aggravators: (1)pecuniary gain and (2)especially heinous, cruel and depraved.*Id.* at 149. The judge found depravity but not pecuniary gain since he believed the Legislature had intended that aggravator only for contract killings.*Id.* Weighing aggravators and mitigators, he imposed death.*Id.* On appeal, Petitioners argued the evidence didn't support the depravity aggravator.*Id.* The appellate court agreed but also found the judge mistaken in his interpretation of legislative intent.*Id.* Thus, on retrial, the State could re-submit the depravity aggravator.*Id.*

Petitioners were again convicted and, at sentencing, the State presented evidence supporting the depravity and pecuniary gain aggravators and alleged a new, third aggravator. The judge found all three and imposed death.*Id.* at 150.

The court rejected Petitioners' double jeopardy argument, stating their original holding was not a death penalty acquittal since they had simply held death penalty couldn't be based solely on the depravity aggravator because insufficient evidence supported it.*Id.* The appellate court again found insufficient evidence to support the depravity aggravator, but, finding sufficient evidence of the other two aggravators, concluded death was appropriate. *Id.*

The United States Supreme Court held that re-imposing death did not violate Double Jeopardy.*Id.* The trial judge had not acquitted Petitioners since he imposed death. The appellate court did not acquit of death, specifically advising that, upon re-trial, the State could consider the pecuniary gain aggravator since the

trial judge had misunderstood the applicable law.*Id.* at 154-55. The Court's analysis focused on whether the death penalty was appropriate, not the individual statutory aggravators. *Id.* at 155-56,160.

Poland pre-dates *Ring, Apprendi* and *Whitfield*. Those cases compel a different analysis and result, like that in *Capano*. In *Whitfield*, the parties agreed the jury must "determine all facts on which the legislature has predicated imposition of the death penalty."107 S.W.3d at 258. *Ring* and *Apprendi*, *Whitfield*'s underpinnings, explicitly require the jury's factual findings be unanimous beyond a reasonable doubt.*Apprendi*, 530 U.S. at 490;*Ring*, 536 U.S. at 602.

When the State charges an aggravator, an element of the offense, it must prove it unanimously beyond a reasonable doubt. If, despite the State's best efforts, the jury does not so find, it should not be allowed to ask a second jury to ignore that prior acquittal and seek conviction based on evidence the first jury rejected. "To permit a second trial after an acquittal … would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant…."*Poland*, 476 U.S. at 156, quoting *United States v. Scott*, 437 U.S. 82, 91(1978).

This Court must reverse and remand for a new penalty phase trial.

III.Court Improperly Grants State's Cause Strike

The trial court abused his discretion in granting the State's challenge for cause of Venireperson Mark Kerr because this denied Vincent due process, a fair, impartial jury, and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21 in that Kerr's responses revealed he could apply the law by considering both punishments and not requiring the State to prove its case by greater than beyond a reasonable doubt. His hesitation in answering questions merely revealed his deliberate nature, not an inability to follow the law.

Judge Ross abused his discretion in sustaining the state's cause challenge to Venireperson Kerr. Kerr's ability to follow the instructions was unimpaired by his views. He was qualified to sit. This denied Vincent's state and federal constitutional rights to due process, a fair, impartial jury, and freedom from cruel and unusual punishment.

Venirepersons may be struck for cause **only** if their views prevent or substantially impair their ability to abide by their oath and the instructions. *Wainwright v. Witt*, 469 U.S. 412, 424(1985); *State v. Christeson*, 50 S.W.3d 251, 264(Mo.banc2001); *State v. Clark-Ramsey*, 88 S.W.3d 484, 486(Mo.App.,W.D. 2002). Because capital juries have vast discretion to decide if death is the "proper penalty," general objections to the death penalty or conscientious and religious scruples against it do not disqualify venirepersons from serving. *Witherspoon v. Illinois*, 391 U.S. 510, 519(1968);Mo.Const.,Art.I,§5. One "who opposes the death

penalty, **no less than one who favors it**, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror."*Witherspoon*, 391 U.S. at 519(emphasis added).

The Court has scrupulously followed *Witherspoon*.*Davis v. Georgia*, 429 U.S. 122(1976); *Maxwell v. Bishop*, 398 U.S. 262(1970); *Boulden v. Holman*, 394 U.S. 478(1969). A narrow class of venirepersons, only those who can never consider death or are partial about the guilt-phase decision when death is a possibility, cannot serve.*Witherspoon*, 391 U.S. at 520-22. If exclusion occurs "on any broader basis than this, the death sentence cannot be carried out…."*Id.* at 522-23, n. 21. If the court removes venirepersons who merely have generalized objections to or scruples against the death penalty, error occurs.*Id.* at 520. "The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.'"*Gray v. Mississippi*, 481 U.S. 648, 658(1987), *quoting Witt*, 469 U.S. at 423.

Rulings on cause challenges will be upheld unless clearly against the evidence and an abuse of discretion.*Christeson*, 50 S.W.3d at 264. While the trial court is in the best position to evaluate qualifications, they "are not determined by an answer to a single question, but by the entire examination."*Id.*;*State v. Johnson*, 22 S.W.3d 183, 188(Mo.banc2000). Judge Ross abused his discretion in granting

the State's cause challenge of Kerr since he discounted Kerr's responses revealing he could follow the law.

Kerr told Larner he believed in the death penalty, could sign the death verdict as jury foreman, and could announce a death verdict in open court. (T407,409). Kerr hesitated "20 seconds"(T405) when he began answering Larner and acknowledged giving answers "some thought."(T405). Kerr said if someone didn't believe in the death penalty, he "may not use it."(T407). Kerr was concerned Larner's hypothetical questions sought commitments.(T410).

Judge Ross asked, "In a proper case, in a case where you believe there are all of these circumstances, is there a case like that where you could vote for the death penalty?"(T411-12). Kerr responded "yes."(T412).

Larner asked if Kerr would require more than proof beyond a reasonable doubt since this was a death case.(T412). Kerr initially responded he would "[i]f that's the only choice you're giving me,…."(T415). He then stated he only need be "firmly convinced that the person is guilty and the person should receive a death sentence," and thus would apply the correct standard. (T438-39).

The State moved to strike Kerr for cause because of his "20 second" hesitation in answering, his concern that the process be handled correctly, and his initial statement that indicated he wanted a high burden of proof.(T440-42).

Counsel responded that Kerr was thoughtful and concerned that the State was seeking a commitment.(T442-43). He could impose death, he could sign a death verdict, and he could announce a death verdict in open court. *Id.* As to the

burden of proof issue, once counsel clarified the definition for Kerr, he stated he could follow the law. *Id.*

Larner responded that Kerr hesitated and "thought" he could follow the burden of proof instruction—"firmly convinced."(T443-44). Larner further stated:

> This is a kind of juror that's not going to follow the law if he doesn't agree with the law. I mean, you know, just because he might say "firmly convinced" is okay, based on what he said about, you know, if my father gets sick, I won't show up, you won't find me. This is the kind of person that's not going to follow the law if he doesn't agree with it. He also said justice isn't always important or isn't always served in a case and that that's not always the most important thing.

(T443-44). Counsel clarified that Kerr's comments about justice were general.(T444).

Judge Ross found Kerr thoughtful and hesitant. Kerr wavered in his ability to consider the death penalty and believed it wasn't administered fairly. He would require proof above and beyond that required by law, according to Judge Ross. Judge Ross then struck him for cause.(T444-45).

Peremptory strikes based on hesitancy in answering questions or stating an ability to impose either penalty are often deemed race- and gender-neutral.*State v. Taylor*, 18 S.W.3d 366, 372-73(Mo.banc2000); *State v. Williams*, 159 S.W.3d 480, 485(Mo.App.,S.D.2005); *People v. Gray*, 118 P.3d 496 (Cal.2005); *People v. Hooper*, 552 N.E.2d 684(Ill.1989). The same standard isn't applicable to cause

strikes. Veniremembers may be struck for cause **only** if their views prevent or substantially impair their ability to abide by their oath or the instructions.*Witt*, 469 U.S. at 424. Hesitancy—a 20-second delay—in responding does not signal that kind of inability. Especially where Kerr specifically stated he believes in the death penalty, can vote for it, serve as foreperson, and announce his verdict in open court, to hold his views prevent or substantially impair his ability to perform his duties is contrary to the record. This case is distinguishable from *State v. Johnson*, 968 S.W.2d 686(Mo.banc1998). There, the court granted the State's cause strikes because of veniremembers' "hesitancy." Theirs were not *de minimis* delays in responding but express hesitancy about whether they could impose a penalty.*Id*. at 692-95.

Striking Kerr for cause gave the State an extra peremptory since Kerr was qualified to serve. This Court must reverse and remand for a new trial.

IV.Court Improperly Denies Vincent's *Batson* Challenge

The trial court clearly erred in overruling Vincent's *Batson* objection to the State's peremptory strike of African-American Venirewoman Wanda Bryant because that action denied Vincent and Bryant equal protection and Vincent due process, a fair, impartial jury, and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV;Mo.Const., Art.I,§§2,10,18(a),21, in that Vincent challenged the State's strike, identified Bryant as African-American, and showed the State's purported reasons—that Bryant would require proof beyond all doubt, leans toward life and hesitated 20 seconds when asked if she could consider death—were pretextual. The State asked Bryant this question first and, since she had never heard it before, some hesitation was not unusual; Bryant could impose either penalty, announce her verdict in open court and sign the death verdict, and, with his peremptories, the prosecutor sought to remove all remaining African-Americans. Only because the court sustained Vincent's *Batson* challenges to the other three peremptories lodged against African-Americans was Vincent's jury not all-white.

"The Constitution forbids striking even a single prospective juror for a discriminatory purpose."*United States v. Vasquez-Lopez*, 22 F.3d 900, 902(9thCir. 1994). Although this Court has found the St. Louis County Prosecutor's Office discriminates in jury selection, *State v. McFadden*, 191 S.W.3d 648(Mo.banc 2006); *State v. McFadden*, 216 S.W.3d 673(Mo.banc2007), Assistant Prosecutor

Larner attempted to remove all African-Americans here, exercising four peremptories against the remaining African-Americans—Sandy Robinson, Kevin Slaughter, Anderson Banks, and Wanda Bryant.(T924-25). Judge Ross sustained Vincent's *Batson*[9] challenges to Robinson, Slaughter and Banks (T921-51) but denied it to Bryant(T951-54) even though Larner's patterns of questioning revealed racially-motivated bases for his strikes. Larner's challenge to Bryant was racially-motivated and removing her violated equal protection, due process, a fair trial before a fair, impartial jury and freedom from cruel and unusual punishment.

Batson Procedure

Defendants can establish a prima facie case of discrimination in jury selection by "the totality of the relevant facts." *Batson*, 476 U.S. at 94. When a defendant makes a timely *Batson* challenge, he first must challenge the veniremembers the State is striking and identify their cognizable racial groups.*State v. Parker*, 836 S.W.2d 930, 934,939(Mo.banc 1992). The State must provide a race-neutral reason, more than an unsubstantiated denial of discriminatory purpose.*Id.* The defendant must show the State's explanation is pretextual and its true rationale is racial.*Id; Snyder v. Louisiana*, 128 S.Ct. 1203, 1207(2008).

At the third step, the trial court must consider whether "(1) the explanation is race-neutral, (2) related to the case to be tried, (3) clear and reasonably specific, and (4) legitimate."*State v. Edwards*, 116 S.W.3d 511, 527(Mo.banc2003). In

[9] *Batson v. Kentucky*, 476 U.S. 79(1986).

determining whether purposeful discrimination has occurred, the court's "chief consideration should be the plausibility of the prosecutor's explanations in light of the totality of the facts and circumstances surrounding the case."*Id.*; *Miller-El v. Cockrell*, 537 U.S. 322, 339(2003); *Parker*, 826 S.W.2d at 939.

In assessing purposeful discrimination, the court should consider whether similarly-situated white veniremembers were struck; the logical relevance between the stated reason and the case; the prosecutor's statements, demeanor and questions; past experiences with the prosecutor and any "objective factors bearing on the state's motive to discriminate on the basis of race, such as the conditions prevailing in the community and the race of the defendant, the victim and the material witnesses."*Id*. at 939-40; *Edwards*, 116 S.W.3d at 527; *Miller-El v. Dretke*, 545 U.S. 231, 241 n.2(2005).

> A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Id. at 252(internal citations omitted).

Findings on a *Batson* challenge must be set aside if clearly erroneous. *McFadden*, 191 S.W.3d at 651; *State v. Antwine*, 743 S.W.2d 51, 66 (Mo.banc1987). Findings are clearly erroneous when, although evidence may support them, the reviewing court has the definite and firm conviction a mistake was made.*Id.*

Bryant told Larner nothing would keep her from considering either sentence; she could vote for death in the proper case; could serve as foreperson and sign the verdict; and could announce it in open court.(T484-86). She acknowledged favoring life without parole.(T486). Larner noted she hesitated, "giving it quite a bit of thought" when asked whether she could impose death.(T484-85). After some clarification, Bryant also stated she would never require more than proof beyond a reasonable doubt.(T503,526-27). The court stated, "ultimately, she indicated that she could follow the instruction of law, would not hold the State to a greater burden of proof. I agree she said she would lean towards life without parole, but she said she could consider the death penalty."(T527).

Larner moved to strike Bryant peremptorily because she would require more than proof beyond a reasonable doubt and would "lean toward life without parole."(T953). He noted her 20-second hesitation before she stated she could vote for death and her statement that she favored life without parole.*Id.*

The Court recalled Bryant's reservations, that she favored life without parole, and was hesitant about the death penalty.(T954). He found Larner's reasons for the strike were race-neutral.*Id*.

While Larner's questions and rationale at first blush might appear race-neutral, the totality of the circumstances reveals they are not. Larner alleged Bryant, the first in her panel he questioned, "hesitated" 20 seconds before affirming she could impose death.(T953). Larner also asked African-American

Kevin Slaughter whether, in a "proper case," he could impose death, and, after Slaughter responded affirmatively, asked "any hesitation on that?"(T195). When questioning African-American Mark Kerr, also the first in his panel to be questioned, Larner "noticed [he] hesitated about 20 seconds" before affirming he could impose death.(T405).

Larner asked no Caucasians if their responses provoked hesitation. Also, with both Bryant and Kerr, first in their groups to be questioned and thus first to formulate answers, Larner clocked their supposed hesitation at 20 seconds. When viewed together, Bryant, Kerr and Slaughter's voir dire reveals Larner's "broader pattern of practice" to exclude African-Americans through patterns of questioning.*Miller-El v. Dretke*, 545 U.S. at 253; *Snyder*, 128 S.Ct. at 1210-11. In both *Miller-El v. Dretke* and *Snyder*, the Court condemned the State's use of disparate lines of questioning with white and African-American veniremembers and that disparate questioning formed part of the Court's rationale for finding the State's strikes to have been race-based. *Id.* at 1211-12; *Dretke*, 545 U.S. at 255. In *Dretke*, for example, the "reasonable inference" was that State used a different, more graphic script with African-American veniremembers because race was the major consideration in the way they exercised their strikes. *Id*. at 260. While Larner did not use a more graphic script with the African-American veniremembers here, his questions were designed, just as in *Dretke*, "to prompt some expression of hesitation to consider the death penalty and thus to elicit

plausibly neutral grounds for a peremptory strike of a potential juror subjected to it, if not a strike for cause." *Id.* at 255.

Larner's strike of Bryant must also be viewed within the broader context of his Office's pattern and history of ensuring all-white juries make life and death decisions. That Office has "manipulate[d] the racial composition of the jury in the past."*Id*. at 254; *Miller-el v. Cockrell*, 537 U.S. 322, 346(2003). Despite this Court's already having reversed twice for *Batson* violations, Larner nonetheless attempted to secure an all-white jury. He almost succeeded.

Larner's peremptory strike of Bryant was racially-motivated. "The right to sit before a jury of one's peers, chosen not because of race, but because of their standing as citizens doing their civic duty, is essential to a fair trial." *Edwards*, 116 S.W.3d at 551(Teitelman, J.,concurring). This Court should reverse and remand for new trial.

V.State's Case Rife With Other Crimes Evidence

The trial court erred, plainly erred, and abused its discretion in admitting in guilt phase through Larner's opening; Mark Silas, Officer Menzenwerth and Officer Stone that Silas identified Vincent from a photograph in the station and Heather Burke's comparison of Vincent's prints to those in the "master file" because this denied Vincent due process, a fair trial, trial for the charged offenses, and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,17,18(a), 21, in that it let the jury convict Vincent based on evidence and innuendo that he had committed and would commit other crimes.

Vincent was entitled to be tried only for these charged offenses. The State nonetheless sought to convict using evidence of other crimes. Judge Ross plainly erred and abused his discretion in letting witnesses refer to other crimes, and not declaring a mistrial *sua sponte* when the State elicited this testimony. This violated Vincent's state and federal constitutional rights to due process, a fair trial, and freedom from cruel and unusual punishment.

Criminal defendants are entitled "to be tried only for the offense for which they are charged."*State v. Hornbuckle*, 769 S.W.2d 89, 96(Mo.banc1989);Art.I, §17,Mo.Const. Due process is violated when the State adduces evidence or argues the defendant has committed, been accused or convicted of, or definitely

associated with another crime.*Id*., *State v. Clark*, 112 S.W.3d 95, 100 (Mo.App.,W.D. 2003).

Proof the defendant committed other crimes is inadmissible unless it legitimately tends to establish guilt of this offense.*State v. Williams*, 804 S.W.2d 408, 410(Mo.App.,S.D.1991). Evidence of other crimes may be admitted only if its probative value outweighs its prejudicial effect.*State v. Mallett*, 732 S.W.2d 527, 534(Mo.banc1987). It is "highly prejudicial and should be received only when there is strict necessity." *Williams*, 804 S.W.2d at 410; *State v. Collins*, 669 S.W.2d 933, 936(Mo.banc1984). If adduced solely to show the defendant's propensity to commit the charged offense, it is inadmissible.*United States v. Mejia-Uribe*, 75 F.3d 395, 398-99(8thCir.1996).

Courts have broad discretion to admit and exclude evidence and error occurs only if discretion is clearly abused.*State v. Clayton*, 995 S.W.2d 468, 474 (Mo.banc1999); *State v. Dowell*, 25 S.W.3d 594, 602(Mo.App.,W.D.2000); *State v. Harp*, 101 S.W.3d 367, 375(Mo.App.,S.D.2003). An abuse of discretion occurs if rulings are clearly against logic and so arbitrary and unreasonable as to shock the sense of justice.*State v. Brown*, 939 S.W.2d 882, 883(Mo.banc1997). On appeal, the trial court's decision is reviewed for error and prejudice and will be reversed if the error was so prejudicial it denied a fair trial.*Clayton*, 995 S.W.2d at 474. If counsel doesn't object, review is for plain error. *Rule 30.20.* Here, a manifest injustice will occur if the error is uncorrected since Vincent's jury decided his guilt of this offense against the backdrop of numerous other crimes.

Despite serious questions about the veracity of the State's witnesses, this jury was encouraged to convict Vincent because of his prior bad acts.

Evidence of uncharged crimes is inadmissible to show a defendant has a propensity to commit similar crimes and thus is guilty of the charged offense. *State v. Gilyard*, 979 S.W.2d 138, 140(Mo.banc1998), *citing State v. Bernard*, 849 S.W.2d 10, 13(Mo.banc1993). It improperly "'may encourage the jury to convict the defendant because of his propensity to commit such crimes without regard to whether he is actually guilty of the crime charged.' "*State v. Burns*, 978 S.W.2d 759, 761(Mo.banc1998), *quoting Bernard*, 849 S.W.2d at 16.

Evidence must be logically relevant—having "some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial." It must be legally relevant—its "probative value [must] outweigh[] its prejudicial effect." *Id.* It cannot merely prove the defendant did it before and therefore is likely to have done it again.

This evidence of uncharged crimes was neither logically nor legally relevant. Through several witnesses, Larner argued and adduced evidence that, when Todd died, Vincent's picture was already posted in the police station, suggesting he was "wanted" for other crimes. In Larner's guilt phase opening, he stated, when Silas came into the station, he identified Vincent as the second shooter, "…by the way, there's a photograph on the wall of the room that I'm being interviewed in right there. That's the man. There he is. There's a photograph of him right here on the wall. That's him, Officer."(T1007). On

direct, Larner repeatedly asked "Isn't that the picture that you pointed to on the wall at the Pine Lawn Police Station and said, that's JR, the second person that shot Todd?;" "…while you were doing our initial interview, you pointed out a picture in this room, um—the picture you just—you—the picture you see on the wall, that's the same person that shot?"(T1059-60). When asked whether "something occur[red] with Mark Silas regarding a photograph on the wall of the room where the interview was occurring?," Officer Stone recounted "There was a picture of a subject, and Silas stated that was a person who shot Todd Franklin." (T1416). Officer Menzenwerth agreed Silas picked "out this photo from hanging on the wall…at the police department…in Pine Lawn…A photo of Vincent McFadden."(T1609).

Since Silas had already identified Vincent as the second shooter, these references to Vincent's photograph were designed to prejudice Vincent. They lack logical relevance, having no legitimate tendency to establish Vincent's guilt of the charged offense. They lack legal relevance since their prejudicial effect far outweighed their probative value. After all, nobody needed to refer to the photograph to establish that Silas identified Vincent as a shooter. Larner's purpose in harping on the photograph was clear—to emphasize Vincent's prior criminal activity.

Pouring salt into the wounds, Heather Burke, latent print examiner, compared a print on a cigar found near Todd's body to prints from "the Automated Fingerprint Identification System,"--"master files."(T1310,1312). She determined

the cigar print "is an exact match to the right thumb of the fingerprint card with the name bearing 'Vincent McFadden.'"(T1315). She acknowledged one of the comparison cards was an "older card," which existed before her analysis even began.(T1315,1317).

Burke's testimony about Vincent's prints on file was not logically relevant since it had no legitimate tendency to establish Vincent's guilt of **this** offense. Even if logically relevant, it wasn't legally relevant. Since Burke could "match" the cigar print to Vincent because she took his prints while doing her analysis, the references to "master files," and "older card" and AFIS created enormous prejudice by suggesting Vincent's involvement in prior criminal activity.

Especially here, since the State sought death not because of this offense but because it believed Vincent was involved in other crimes, it cannot be said with certainty the jury was not affected—it was not harmless beyond a reasonable doubt.*Chapman v. California*, 386 U.S. 18, 24(1967). This Court must reverse and remand for a new trial.

VI.Instruction 18 Violates Notes on Use

The trial court erred in overruling Vincent's objections and submitting Instruction 18, patterned after MAI-CR3d 314.40, because that denied Vincent due process, a properly-instructed jury, and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV;Mo.Const., Art.I,§§10,18(a),21, in that, contrary to the Notes on Use, the Instruction submitted, as separate numbered paragraphs, Vincent's first degree assault and armed criminal action convictions. Vincent was prejudiced because, when the jury weighed aggravators and mitigators, it was encouraged to believe more aggravators were on the "death" side of the scales and death was the appropriate punishment.

Contrary to MAI-CR3d 314.40's Notes on Use, Instruction 18, in separate numbered paragraphs, told the jury to determine whether five statutory aggravators existed.(LF654-55) Instruction 19 instructed they determine whether mitigators outweighed statutory and non-statutory aggravators.(LF656). The jury found all five statutory aggravators and recommended death.(LF684-85). Judge Ross's refusal to follow the Notes on Use violated Vincent's state and federal constitutional rights to due process, a properly-instructed jury and freedom from cruel and unusual punishment.

"Whenever there is an MAI-CR instruction or verdict form applicable under the law and Notes on Use, the MAI-CR instruction or verdict form shall be given or used to the exclusion of any other instruction or verdict form."*Rule*

28.02(c). "The giving or failure to give an instruction or verdict form in violation of this Rule 28.02 or any applicable Notes on Use shall constitute error, the error's prejudicial effect to be judicially determined, provided that objection has been timely made pursuant to Rule 28.03."*Rule 28.02(f)*. Not following the Notes on Use constitutes reversible error when submitting the instruction is error and prejudice results.*State v. Taylor*, 134 S.W.3d 21, 25(Mo.banc2004). Prejudicial effect is determined from the facts and instructions.*State v. Dismang*, 151 S.W.3d 155, 164(Mo.App.,W.D.2004). The instruction's proponent must show no prejudice.*Snyder v. Chicago R.I. & P.R. Co.*, 521 S.W.2d 161, 164 (Mo.App.,W.D.1973).

At the penalty phase instruction conference, counsel objected to Instruction 18's form because it submitted each prior conviction as a separate statutory aggravator, rather than all together as one statutory aggravator, as the Notes on Use mandated.(T2343-44). Larner responded that the instruction tracked MAI-CR3d 314.40.(T2345).

Judge Ross agreed with Larner, believing the Notes on Use mandated that prior convictions be listed in separate paragraphs.(T2346). But, the Notes on Use had changed.(T2346-47).

After reading the current Notes on Use, Judge Ross decided to ignore the change and to follow the former Note instead.(T2347). He gave Instruction 18 over objection.(LF719-20).

Instruction 18 read:

In determining the punishment to be assessed against the defendant for the murder of Todd Franklin, you must first consider whether one or more of the following statutory aggravating circumstances exists:

1. Whether the defendant has a serious assaultive conviction in that he was convicted of Assault in the First Degree on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Daryl Bryant on April 4, 2002.
2. Whether the defendant has a serious assaultive conviction in that he was convicted of Armed Criminal Action on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Daryl Bryant on April 4, 2002.
3. Whether the defendant has a serious assaultive conviction in that he was convicted of Assault in the First Degree on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Jermaine Burns, on April 4, 2002.
4. Whether the defendant has a serious assaultive conviction in that he was convicted of Armed Criminal Action on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Jermaine Burns on April 4, 2002.
5. Whether the murder of Todd Franklin involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly

vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find:

That the defendant killed Todd Franklin after he was bound or otherwise rendered helpless by defendant or another acting with or aiding the defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree at [sic] to the existence of that circumstance.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exists, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(LF654-55).

Statutory aggravators include whether "(1) The offense was committed by a person … who has one or more serious assaultive criminal convictions." §565.032.2RSMo. The previous Note on Use instructed:

When paragraph numbered 1B is submitted, the Court will first, outside the hearing of the jury, determine if the defendant has "one or more serious assaultive criminal convictions." If the Court finds the conviction

to be a "serious assaultive criminal conviction," this paragraph may be used. If the defendant has more than one such conviction, a separate numbered paragraph should be used for each conviction….

The Note on Use in effect at trial eliminated all reference to the "separate numbered paragraph" requirement. Judge Ross believed that Note was "unclear" about how "serious assaultive convictions" must be submitted.(T2347).

Canons of statutory construction are appropriately used to construe Missouri Supreme Court Rules.*State ex rel. Vee-Jay Contracting Co. v. Neill*, 89 S.W.3d 470, 471-72(Mo.banc2002);*State ex rel. Missouri Pacific RR Co. v. Koehr*, 853 S.W.2d 925, 926(Mo.banc1993). In interpreting Rules, we must "ascertain the intent of the Court, giving the language used its plain and ordinary meaning."*Dynamic Computer Solutions, Inc. v. Midwest Marketing Ins. Agency, LLC*, 91 S.W.3d 708, 713(Mo.App.,W.D.2002). If the Court's intent in promulgating a Rule is clear and unambiguous, after "giving the language used its plain and ordinary meaning, [reviewing courts should] give effect to that intent and … not … engage in any construction of the rule."*Short v. Short*, 947 S.W.2d 67, 71(Mo.App.,S.D.1997).

Changes in a statute or Rule are ordinarily intended to have some effect since it is not presumed the change was a useless act. *State ex rel. Missouri State Board of Registration for Healing Arts v. Southworth*, 704 S.W.2d 219, 225(Mo.banc 1986); *Ristau v. DMAPZ, Inc.*, 130 S.W.3d 602, 606(Mo.App.,W.D.2004); *Hillyard v. Hutter Oil Co.*, 978 S.W.2d 75, 78

(Mo.App.,S.D.1998). Changes in an instruction or Note on Use similarly must be deemed to have some effect.

The Notes on Use in effect during Vincent's trial eliminated the requirement that each conviction be listed in separate numbered paragraphs. That change makes this Court's intent clear. Jury instructions based on MAI-CR3d 314.40 now must list those convictions within one paragraph. Refusing to follow the current Note on Use was error. Did it create prejudice?

Instruction 18 asked the jury to decide whether five separate numbered statutory aggravators existed.(LF654-55). Instruction 19 then asked they find whether mitigators outweighed aggravators.(LF656). The verdict form told them to list all statutory aggravators they found—they listed all five.(LF685).

By first instructing the jury they could find as many as five statutory aggravators and then instructing them to list separately each one found, they were encouraged to quadruple-count what should have been one.(T2343-44). Especially here, where Instruction 19 contained no statutory mitigators, expanding the statutory aggravators from two to five undoubtedly affected their decision to impose death. After all, the jury is instructed to "determine whether there are facts or circumstances in mitigation of punishment which are sufficient to *outweigh* facts and circumstances in aggravation of punishment."(LF656)(emphasis added). Increasing the number of statutory aggravators placed a thumb on death's side of the scales and skewed the result toward death.*Stringer v. Black*, 503 U.S. 222, 232(1992). Even when juries find statutory aggravators, they have discretion to

impose a life sentence.*State v. Whitfield*, 107 S.W.3d 253(Mo.banc2003); *State v. Storey*, 986 S.W.2d 462, 464(Mo.banc 1999). Since statutory and non-statutory aggravators are weighed against mitigators, four improperly-submitted aggravators make a difference. *See, Michael Daniels v. State*, 2008WL 2205519 (Ark.5/29/08)(harmless error analysis inappropriate when one of two statutory aggravators declared invalid since jury never had the opportunity to weigh only one aggravator against one mitigator).

The State cannot demonstrate no prejudice resulted when the jury considered four times as many statutory aggravators as the MAI's permit. This Court should reverse and remand for a new penalty phase or reverse and order Vincent re-sentenced to life without parole.

VII.Instruction 18 Penalizes Vincent for Another's Conduct

The trial court erred and plainly erred in submitting Instruction 18 and accepting the jury's death verdict because that denied Vincent due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21 in that the "depravity of mind" aggravator submitted in Instruction 18 let the jury sentence Vincent to death based on Michael Douglas's conduct.

The jury must give individualized consideration to a defendant's argument for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 605(1978). Instructing Vincent's jury to find one statutory aggravator based on Michael Douglas's conduct denied Vincent's state and federal constitutional rights to due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment.

MAI's are presumptively valid and must be given to the exclusion of other instructions.*State v. Johnson*, 207 S.W.3d 24, 46-47(Mo.banc2006). This Court will reverse if an instruction was erroneous and prejudice resulted.*Id*. at 46-47; *State v. Westfall*, 75 S.W.3d 278, 280(Mo.banc2002);*Rule 28.02(f)*. Error from failing to give an instruction that comports with MAI and the law is presumed prejudicial and the State bears the burden to clearly establish no prejudice. *Westfall*,75 S.W.3d at 284.

Over objection,[10] the court gave Instruction 18, which required the jury unanimously beyond a reasonable doubt find at least one statutory aggravator, including:

> ...Whether the murder of Todd Franklin involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find: That the defendant killed Todd Franklin after he was bound or otherwise rendered helpless by defendant or another acting with or aiding the defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life.

(LF654-55). The jury found "depravity of mind."(LF685).[11]

Instruction 18 was based on MAI-CR3d 314.40. Note on Use 8 cautions, "If depravity of mind is being submitted when the defendant acted with or aided another in the killing, these paragraphs may be modified accordingly. Any such modification must make clear that a finding of depravity of mind must be premised upon the acts and 'intent' of the defendant, not those of any other

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[10] Since counsel objected to the Instruction on different grounds, Vincent requests plain error review.*Rule 30.20*.

[11] In Point VI, Vincent asserts the jury's failure to find the limiting construction constitutes a failure to find it beyond a reasonable doubt.

person." That caveat is based upon *Lockett, State v. Isa*, 850 S.W.2d 876 (Mo.banc1993), and *State v. Hutchinson*, 957 S.W.2d 757(Mo.banc1997).

Mrs. Isa's jury was instructed it could find depravity if it found:

> 1. That the defendant Maria Isa acting together with Zein Isa inflicted physical pain or emotional suffering on Palestina Isa and that the defendant Maria Isa did so for the purpose of making her suffer before dying, and
>
> 2. That the defendant Maria Isa acting together with Zein Isa committed repeated and excessive acts of physical abuse upon Palestina Isa and the killing was therefore unreasonably brutal, and
>
> 3. That the defendant Maria Isa acting together with Zein Isa killed Palestina Isa after she was bound or otherwise rendered helpless by defendant and that defendant Maria Isa thereby exhibited a callous disregard for sanctity of human life.

Isa, 850 S.W.2d at 901-02. The jury was also instructed Mrs. Isa was responsible for her conduct and her husband's if she acted with the common purpose of committing the offense or, to commit it, aided or encouraged him.*Id.* at 901.

This Court reversed because the instruction invited the jury to assess her punishment based on her husband's conduct.*Id.* at 902. "Jury instructions setting out statutory aggravating circumstances—those circumstances that, if found, justify the death sentence—must be unquestionably focused on the convicted murderer's own character, record and individual mindset as betrayed by her own

conduct. Although it is permissible to find a person guilty of murder for acts done in concert with another, it is never permissible to sentence a person to death for acts of another."*Id.* at 902-03; *Lockett*, 438 U.S. at 605. The jury **could not** "consider Zein Isa's conduct when assessing Maria Isa's punishment."*Id.* at 903. They **could** consider whether **she** intended to make her daughter suffer, **her** acts resulted in an unreasonably brutal murder, and **her** acts showed a callous disregard for the sanctity of human life.

Instruction 18 let Vincent's jury sentence him to death for Michael Douglas's conduct. They could find depravity if Franklin was killed "after he was bound or otherwise rendered helpless *by defendant **or another** acting with or aiding the defendant."*(emphasis added). This language clearly authorized a finding of depravity even if Michael took the actions in question.

This was especially true since, in guilt phase, the jury was instructed:

> A person is responsible for his own conduct and he is also responsible for the conduct of another person in committing an offense if he acts with the other person with the common purpose of committing that offense or if, for the purpose of committing that offense, he aids or encourages the other person in committing it.

(LF610). Not being otherwise instructed, they could well have believed that definition of accomplice liability still controlled. *State v. Scott*, 183 P.3d 801 (Kan.2008); *see also State v. Phillips*, 940 S.W.2d 512, 517-18(Mo.banc 1997)(evidence that another person took the actions that constituted the depravity

of mind was material to punishment and failure to disclose it undermines confidence in the outcome of the proceeding).

Since Instruction 18 let the jury consider Michael's conduct in assessing Vincent's punishment, Vincent's death sentence cannot stand. This Court must reverse and remand for a new penalty phase or reverse and order Vincent re-sentenced to life without parole.§565.040RSMo.

VIII.Instruction 18: Jury Doesn't Find Limiting Construction

The trial court erred and plainly erred in accepting the jury's death verdict and sentencing Vincent to death because this denied Vincent due process, a fair trial, reliable jury sentencing and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I, §§10,18(a),21, in that although the jury was instructed it could find the "murder of Todd Franklin involved depravity of mind" only if it found "the defendant killed Todd Franklin after he was bound or otherwise rendered helpless by defendant or another acting with or aiding the defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life," and Judge Ross directed the jury to write out the statutory aggravators they found "verbatim," the jury did not find the limiting construction.

Alternatively, if the jury found the limiting construction, it is void for vagueness because, if the victim is "rendered helpless" by one shot, the limiting construction applies to any case involving more than one shot. Because the jury's verdict was based upon its finding that mitigators did not outweigh aggravators, its improper consideration of this aggravator skewed its decision toward death.

Vincent's jury was responsible for making all factual findings upon which an increased penalty was premised.*Ring v. Arizona*, 536 U.S. 584(2002); *Apprendi v. New Jersey*, 530 U.S. 466, 490-94(2000); *State v. Whitfield*, 107 S.W.3d 253(Mo.banc2003). Nonetheless, after the jury didn't find the facts of the

"limiting construction" of the "depravity of mind" aggravator, the judge accepted its death verdict. Vincent's sentence violates his state and federal constitutional rights to due process, a fair trial, reliable jury sentencing and freedom from cruel and unusual punishment. Alternatively, if this Court decides the jury found the "limiting construction," it is unconstitutionally vague.

MAI's are presumptively valid and must be given to the exclusion of other instructions.*State v. Johnson*, 207 S.W.3d 24, 46-47(Mo.banc2006). This Court will reverse if an instruction was erroneously submitted and prejudice resulted.*Id*.; *State v.Westfall*, 75 S.W.3d 278, 280(Mo.banc2002); *Rule 28.02(f)*. Failure to give an instruction that comports with MAI, the Notes on Use or the law creates reversible error.*Westfall*, 75 S.W.3d at 284. It is presumed prejudicial and, to overcome that presumption, the State must "clearly establish" prejudice did not result.*Id.*

Instruction 18 directed the jury to determine unanimously beyond a reasonable doubt whether…

> 5. …the murder of Todd Franklin involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find:
>
> That the defendant killed Todd Franklin after he was bound or otherwise rendered helpless by defendant or another acting with or aiding

the defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life.(LF655).

During penalty phase deliberations, the jury asked, "If we decide that aggravating circumstances outweigh mitigating circumstances, how we report these on the form? I.E. Do we write the complete narration verbatim from Inst. #18 or do we just indiction (sic) #1, #2, etc. from Instruction 18?"(LF679). The judge responded, "Verbatim."(LF680).

The jury returned a death verdict and wrote, "#5-Whether the murder of Todd Franklin involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman."(LF685). It found "depravity of mind," but not the limiting construction.[12]

States have a constitutional responsibility to tailor and apply their law "in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428(1980), citing *Gregg v. Georgia*, 428 U.S. 153, 196 n.47(1976)(Stewart, Powell, Stevens, JJ.). They must define death-eligible crimes in a way that obviates standardless sentencing discretion.*Id.* The sentencer's discretion, "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."*Id.* at 189. Since capital sentencing

[12] In the first trial, Vincent challenged the jury's failure to make the same factual finding. Appellant's Brief at 138-141, *State v. McFadden*, SC86857. Since the *Batson* claim was dispositive, no guidance was given about this claim.

systems could have standards so vague as to not adequately channel sentencing discretion, aggravators "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."*Zant v. Stephens*, 462 U.S. 862, 877(1983).

Missouri juries may consider, as a statutory aggravator, whether the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."§565.032.2(7)RSMo. This language, without further definition, is too vague to provide adequate guidance.*State v. Feltrop*, 803 S.W.2d 1, 14(Mo.banc1991);*Godfrey*, 446 U.S. at 428. This Court attempted to provide guidance through limiting constructions.*State v. Preston*, 673 S.W.2d 1, 11(Mo.banc1984). Without a limiting construction, the aggravator cannot be sustained.*Feltrop*, 803 S.W.2d at 15; *State v. Griffin*, 756 S.W.2d 475, 490(Mo.banc1988). The limiting language provides objective standards about what constitutes "depravity of mind," to avoid arbitrary and capricious imposition of death sentences, and to "ensure that the aggravator sufficiently distinguishes cases in which the death penalty is imposed from those in which it is not."*State v. Johnson*, 207 S.W.3d 24, 46 n.17(Mo.banc2006).

While Instruction 18 contained the limiting language and Judge Ross told the jurors to write "verbatim" their findings, they did not write the limiting language. Their subsequent failure to follow the Judge's explicit directive makes

clear that they did not find the limiting construction unanimously beyond a reasonable doubt.

The judge should not have accepted the jury's verdict and then imposed death based, even in part, on this aggravator. Since the jury didn't make the factual findings on which this aggravator is predicated, Vincent's death sentence cannot stand.[13]

Even if this Court speculates that the jury found the "limiting construction," Vincent's death sentence cannot stand. The Instruction defined depravity of mind as a killing "after [Franklin] was bound or otherwise rendered helpless" by Vincent or another.(LF655). Larner theorized Franklin was "rendered helpless" by Michael shooting first and Vincent second.

If an aggravator is so broad it covers any fact situation, it ""obviously cannot fulfill its constitutional responsibility to eliminate the consideration of impermissible factors and to provide a recognizable and meaningful standard for choosing the few who are to die.""*Newlon v. Armontrout*, 885 F.2d 1328, 1334(8thCir.1989), *quoting Cartwright v. Maynard*, 822 F.2d 1477,

[13] Counsel challenged this in the new trial motion (LF724-25), but did not object when the verdict was returned. If this point is incompletely or improperly preserved, Vincent requests plain error review since this error created a manifest injustice or a miscarriage of justice.*Rule 30.20*.

1485(10th Cir.1987), *quoting* Rosen, The "Especially Heinous" Circumstance in Capital Cases—The Standardless Standard, 64 N.C.L.Rev. 941, 954(1986).

Larner alleged Michael rendered Franklin "helpless" by shooting him first. Thus, whenever someone is shot more than once, the first shot renders him helpless. This provides no meaningful way to distinguish the few against whom death is sought from everyone else who inflicts multiple wounds.*Contra*, *State v. Butler*, 951 S.W.2d 600, 606(Mo.banc 1997).

Although other statutory aggravators existed, this Court cannot assume the jury's verdict would be the same if this aggravator were struck from the balance. It cannot presume the jury would unanimously beyond a reasonable doubt find aggravators outweighed mitigators and death was the appropriate punishment. *Whitfield*, 107 S.W.3d at 263; *Michael Daniels v. State*, 2008WL 2205519 (Ark. 2008). This Court must reverse and remand for a new penalty phase or resentence Vincent to life without parole.

IX.Instruction 18: Prior Jury Didn't Find Aggravator

The trial court erred in overruling Vincent's objections, submitting Instruction 18 and accepting the jury's death verdict because that denied Vincent due process, a properly-instructed jury, freedom from cruel and unusual punishment and from twice being tried for the same offense, U.S. Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),19,21, in that the jury in Vincent's first trial did not find the limiting construction of the "depravity of mind" aggravator and thus rejected it.

Collateral estoppel is part of the Fifth and Fourteenth Amendments' guarantee against double jeopardy. *Ashe v. Swenson*, 397 U.S. 436, 445(1970); *Benton v. Maryland*, 395 U.S. 784, 794(1969). "When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."*Ashe*, 397 U.S. at 443. The "first trial [cannot be treated] as no more than a dry run for the second prosecution."*Id.* at 447.

The first jury did not find the "depravity of mind" limiting construction. It thus rejected that aggravator, precluding its re-submission. By submitting it to this jury and accepting its death verdict, Judge Ross violated Vincent's state and federal constitutional rights to due process, a properly-instructed jury, freedom from cruel and unusual punishment and twice being tried for the same offense.

In *Ashe*, since the jury's acquittal of the Petitioner necessarily rejected that he was at the scene, "the single rationally conceivable issue in dispute before the

jury," *Id.* at 445, the Petitioner could not be re-tried. He could not be forced to "run the gantlet" again.*Id.* at 445-46. This Court has adopted *Ashe*.

Collateral estoppel means "when an issue of ultimate fact has been determined by a valid judgment, it may not again be litigated between the same parties."*State v. Nunley*, 923 S.W.2d 911, 922 (Mo.banc1996). It applies if, in the prior proceeding: (1) the identical issue was decided; (2) there was a merits decision; (3) the party against whom collateral estoppel is asserted is the same or in privity with a party; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue.*Id.*

In his first trial, Vincent's jury was instructed to find

> Whether the murder of Todd Franklin involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find: That the defendant killed Todd Franklin after he was bound or otherwise rendered helpless by defendant or another acting with or aiding the defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life.

(LF366). It found, "The murder of Todd Franklin involved depravity of mind and, as a result thereof, the murder was outrageously and wantonly vile, horrible and inhuman."(LF375).

Upon re-trial, the court instructed the jury identically (LF654-55) and this jury's finding mirrored the first jury's.(LF685). Counsel objected (T2349-51) and

preserved the issue in the new trial motion.(LF725). This Court will reverse if submitting the instruction was error and prejudice resulted.*State v. Johnson*, 207 S.W.3d 24, 46-47(Mo.banc2006).

The same issue was presented to both juries. It was couched the same through Instruction 18.(LF366,654-55).

Both actions involve the same parties. The State has been represented by the St. Louis County prosecutor's office and the Attorney General's Office, and Vincent by the Public Defender.

The parties had a full and fair opportunity to litigate whether "depravity of mind" existed. The State called multiple witnesses who testified Franklin was shot several times, first by Michael, then Vincent.(T1074-75,1149-50,1193-94,1228-29,1458-59,1461-64,1478-81,1487-1510).

The sole question is whether, by not finding the "limiting construction," the first jury rejected the aggravator and gave a merits ruling.

Instruction 18 directs, to find depravity, the jury **must** find Franklin was bound or rendered helpless before Vincent killed him.(LF366,654-55). Instruction 23 directs that the jury **must** write the statutory aggravators it found unanimously beyond a reasonable doubt to impose death.(LF373,662). Vincent's first jury did not include on its verdict the limiting construction but only said the killing

involved depravity of mind.(LF375).[14] Since the jury is presumed to follow the instructions, *State v. Madison*, 997 S.W.2d 16, 21(Mo.banc1999), its failure to write the limiting construction establishes it did not find that limiting construction.

"The limiting language gives meaning to the words used in the statute and ensures that the statute is constitutionally applied…The language expressly instructs the jury to determine if "depravity of mind" was involved based on the evidence in the case."*State v. Johnson*, 207 S.W.3d 24, 46(Mo.banc2006). When the verdict does not explicitly include those facts, the jury must not have found them unanimously beyond a reasonable doubt. Its failure to find those facts constitutes a rejection of the statutory aggravator.*State v. Whitfield*, 107 S.W.3d 253(Mo.banc2003);*Apprendi v. New Jersey*, 530 U.S. 466(2000); *Ring v. Arizona*, 536 U.S. 584(2002); *accord*, *Capano v. State*, 889 A.2d 968(Del. Supr.2006); *State v. Silhan*, 275 S.E.2d 450, 480-83(N.C.1981).

The Sixth Amendment requires that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."*Jones v. United States*, 526 U.S. 227, 243 n.6(1999). Any finding of fact that increases punishment, "no matter how the State labels it—must be found by a jury beyond a reasonable

[14] That the second jury also did not write out the limiting construction, despite Judge Ross's "verbatim" directive supports Vincent's position the limiting construction lacks an evidentiary and logical basis.

doubt."*Ring*, 536 U.S. at 602(citations omitted). Because statutory aggravators are "'the functional equivalent of an element of a greater offense,'… the Sixth Amendment requires that they be found by a jury."*Id.* at 609, citing *Apprendi*, 530 U.S. at 494, n.19.

Missouri defendants are constitutionally entitled to have the jury make "the factual determinations on which … eligibility for the death sentence [is] predicated."*Whitfield*, 107 S.W.3d at 256. Not "just a statutory aggravator, but every fact that the legislature requires be found before death may be imposed must be found by the jury."*Id.* at 257. "Depravity of mind" findings include not merely those magic words but also proof of the limiting construction.*Ring*, 536 U.S. at 602; *Apprendi*, 530 U.S. at 494. Without it, a jury verdict on that aggravator cannot stand since the jury's factual findings on eligibility steps must be unanimous beyond a reasonable doubt.

Vincent's original jury's failure to make that factual finding constitutes an acquittal of the "depravity of mind" statutory aggravator. Since this "capital sentencing procedure that resembles a trial on the issue of guilt or innocence. … *explicitly requires* the jury to determine whether the prosecution has 'proved its case,'"*Bullington v. Missouri*, 451 U.S. 430, 444(1981)(emphasis in original), the State should have been precluded from using that aggravator again and "forc[ing] [Vincent] to run the gantlet again…."*Id.* at 443, quoting *Green v. United States*, 355 U.S. 184, 190(1957).

This result is compelled by *Whitfield*, *Ring* and *Apprendi*. It also compels a

re-thinking of *Poland v. Arizona*, 476 U.S. 147(1986), because of those later decisions. *See* Point II, *supra*.

When the State charges an aggravator, it must prove it unanimously beyond a reasonable doubt. Whether that proof looks like a mini-trial depends on the aggravator. The State's constitutional obligation remains the same. When it fails to adduce sufficient proof, it should not be permitted to seek death again, hoping it can persuade a **second** fact-finder. "To permit a second trial after an acquittal…would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant…."*Poland*, 476 U.S. at 156, quoting *United States v. Scott*, 437 U.S. 82, 91(1978).

This Court should reverse and order Vincent re-sentenced to life without probation or parole.§565.040.2 RSMo;*Whitfield*, 107 S.W.3d at 271-72.

X.Instruction 18: Jury Doesn't Make "Serious Assaultive" Finding

The trial court erred in overruling Vincent's objections to Instruction 18, submitting it, and accepting the jury's death verdict based, at least in part, upon its findings of four statutory aggravators that purport to be "serious assaultive convictions," because this denied Vincent due process, a properly-instructed jury, jury sentencing, and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10, 18(a),21, in that, (a) although the Instruction purported to make the jury determine whether the convictions were "serious assaultive," it didn't submit the "serious assaultive" facts and (b) insufficient evidence supported a "serious assaultive" finding.

Any fact, other than prior conviction, that increases the maximum penalty must be charged in the indictment, submitted to and found by the jury beyond a reasonable doubt.*Apprendi v. New Jersey*, 530 U.S. 466, 476, 484, 490(2000)*; Ring v. Arizona*, 536 U.S. 584, 609(2002); *United States v. Booker*, 543 U.S. 220, 317-18(2000). When the State seeks death based upon the "serious assaultive criminal convictions" statutory aggravator, §565.032.2(1), the jury must find the prior conviction and its "serious" "assaultive" nature. Instruction 18, based on MAI-CR3d 314.40, did not require the jury make that "serious assaultive" factual finding. By accepting the jury's verdict and sentencing Vincent to death, the Court violated Vincent's state and federal constitutional rights to due process, jury

sentencing, a properly-instructed jury and freedom from cruel and unusual punishment. Further, since no evidence was adduced that the prior convictions were "serious" "assaultive," his sentence violates due process.

MAI-CR3d 314.40 requires, if the State submits "serious assaultive" convictions, the instruction read:

> 1B.Whether the defendant had (a) (one or more) serious assaultive conviction(s) in that he was convicted of *[Insert name of serious assaultive crime,]* on *[date]* in the *[name of court]* of *[name of county, district, etc.]* of *[name of state]* because defendant *[Identify brief facts to establish that crime was a serious assaultive conviction]* (and *[Specify other serious assaultive convictions in the same manner.]*).

The Note on Use instructs, "[b]ecause of the United States Supreme Court decision in *Shephard v. United States*, 544 U.S. 13 (2005), the facts of the 'serious assaultive conviction' should be submitted to the jury." This is in contrast to the prior MAI and cases such as *State v. Johns*, 34 S.W.3d 93, 114(Mo.banc 2000), which made the "serious assaultive" finding one of law, for the judge.

MAI's are presumptively valid and must be given to the exclusion of other instructions. *State v. Johnson*, 207 S.W.3d 24, 46-47(Mo.banc2006). Reversal is warranted if an instruction was erroneously submitted and prejudice resulted. *Id*. at 46-47; *State v. Westfall*, 75 S.W.3d 278, 280(Mo.banc2002); Rule 28.02(f). Reversible error occurs from not giving an MAI instruction or not complying with the accompanying Note on Use where it "may have adversely influenced the

jury…."*Westfall*, 75 S.W.3d at 284. Error is presumed prejudicial and the State must "clearly establish" no prejudice.*Id*.

In penalty phase, the State offered, over objection, Exhibit 101, a certified copy of "an indictment, jury findings of verdicts of guilty and the judgment and sentence in St. Louis County Cause Number 04CR-2658."(T2028). Larner offered the exhibit to prove Vincent's assault and armed criminal action convictions. (T2028-29). The Court gave Instruction 18:

> In determining the punishment to be assessed against the defendant for the murder of Todd Franklin, you must first consider whether one or more of the following statutory aggravating circumstances exists:
>
> 1. Whether the defendant has a serious assaultive conviction in that he was convicted of Assault in the First Degree on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Daryl Bryant on April 4, 2002.
> 2. Whether the defendant has a serious assaultive conviction in that he was convicted of Armed Criminal Action on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Daryl Bryant on April 4, 2002.
> 3. Whether the defendant has a serious assaultive conviction in that he was convicted of Assault in the First Degree on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Jermaine Burns, on April 4, 2002.

4. Whether the defendant has a serious assaultive conviction in that he was convicted of Armed Criminal Action on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Jermaine Burns on April 4, 2002….

(LF654).

Counsel objected because the instruction didn't require factual findings that the convictions were "serious assaultive."(T2343). Larner argued the language "defendant shot at…" proved "serious assaultive."(T2345). The Court found "the certified copy of the judgment and sentence in that case is in evidence and that it contains those facts as well. So those facts actually are in evidence before the jury."(T2345-46). Before instructing the jury, Judge Ross reviewed the exhibit and found, as a matter of law, that the convictions were serious assaultive.(T2359). Counsel objected, arguing the instructions should be more specific on the factual question of what constitutes "serious and assaultive."(T2360). Judge Ross disagreed, "that's not required under the law; that the Court—and that the jury can make that determination based on the evidence that has been admitted, which is the record of judgments and convictions."(T2360-61).

Despite the requirement the jury "'have as much information before it as possible when it makes the sentencing decision,'"*State v. Parkus*, 753 S.W.2d 881, 887(Mo.banc1988); *Gregg v. Georgia*, 428 U.S. 153, 203-04 (1976), and makes findings of fact, *Ring*; *Apprendi*, the court deemed it sufficient to tell Vincent's jury, through Instruction 18 and Exhibit 101, that Vincent "shot at" two men on

April 4, 2002. While that information may have indicated Vincent's conduct was "assaultive," it did not sufficiently allege it was "serious" or "serious assaultive."

State v. Schlup, 724 S.W.2d 236, 239-40(Mo.banc1987) is instructive. The statute then required proof of a "substantial history of serious assaultive convictions." This Court stated:

> We believe that when the legislature used the words "*substantial* history of *serious* assaultive criminal convictions" (emphasis added), they contemplated there being presented to the jury something more than bare evidence of the conviction of the crime of "assault" or the bare conviction of some other crime which may include the element of assault. The jury is required to find a "substantial" history of "serious" assaultive criminal convictions. Assault can range from acts which constitute little more than conduct offensive to another to the most vile, sordid, repugnant and repulsive sexual assault upon the body of another. … Clearly some details and description of crimes must be shown for the jury to find that the convictions were for *serious* assaultive crimes.

The evidence was factual details underpinning Schlup's sexual assault convictions. Those factual details were necessary to prove the offenses' serious assaultive nature. Larner adduced no evidence to demonstrate Vincent's conduct was "serious assaultive" and the Instruction alleged no such facts.

Evidence on aggravators is sufficient if "a reasonable juror could reasonably find from the evidence that the proposition advanced is true beyond a

reasonable doubt."*State v. Johns*, 34 S.W.3d 93, 115(Mo.banc 2000); *State v. Simmons*, 955 S.W.2d 752, 768(Mo.banc1997). Vincent's jury was asked to *presume* the convictions were serious assaultive. Calling something "serious assaultive" doesn't necessarily make it so.*Schlup*, 724 S.W.2d at 239-40. Vincent's jury received no guidance to make that factual determination. As *Schlup* criticized, the Instruction let the jury presume from their titles the offenses were "serious assaultive."

This Court should reverse and remand for a new penalty phase or order Vincent resentenced to life without probation or parole.

XI.Instructions 19 & 21 Violate *Ring, Apprendi* & *Whitfield*

The trial court erred in submitting Instructions 19 and 21 over objection, rejecting Instructions B-E, which would have cured those errors, and admitting over objection evidence of non-statutory aggravators, because those actions denied Vincent due process, a properly-instructed jury, appellate review, reliable sentencing and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21 in that Instructions 19 and 21 place the burden of proof on the defense; don't require the State to prove this eligibility step beyond a reasonable doubt; are contrary to §565.030RSMo by requiring the jury unanimously find mitigators outweigh aggravators to impose life; let the jury consider constitutionally-impermissible evidence; and insulate the jury's decision from appellate review by not requiring written findings and the jury likely considered the evidence adduced and considered under those instructions in deciding penalty phase.

Larner focused penalty phase on the Leslie Addison homicide; allegations Vincent possessed cocaine; victim-impact evidence, and allegations Vincent threatened witnesses.(T1841-2062). He argued in closing, "that [Vincent] killed a second person, is probably what's going to tip over the edge and get him the death penalty. That's my feeling on it."(T2379). He argued, "He's not sick in the head. I mean, he doesn't think like we think. There's no question that he's not. There's no mental disease or defect. He's not psychotic, schizophrenic, anything like that.

That's aggravating."(T2389); "He's not retarded. His grades were average in school. That's aggravating. …He has the capacity to know what was right from wrong. That's aggravating."(T2389).

Although the jurors were told to consider that evidence, weighing it against the mitigation, they were never instructed how to consider it and were instructed Vincent had to prove mitigators outweighed aggravators. Considering non-statutory aggravation in the context of Instruction 19, modeled after MAI-CR3d 314.44, and Instruction 21, modeled after MAI-CR3d 314.48, created error. The instructions misstated the law and misled and confused the jury, prejudicing Vincent.*Martens v. White*, 195 S.W.3d 548, 557(Mo.App.,S.D.2006); *Hosto v. Union Electric Co.*, 51 S.W.3d 133, 142(Mo.App.,E.D.2001). Submitting Instructions 19 and 21, rejecting Instructions B-E, and overruling Vincent's objections to this evidence, violated Vincent's state and federal constitutional rights to due process, a properly-instructed jury, appellate review, reliable sentencing and freedom from cruel and unusual punishment.

This Court will reverse if an instruction was erroneous and created prejudice.*State v. Johnson*, 207 S.W.3d 24, 46-47(Mo.banc2006). MAI's are presumed valid and to be given to the exclusion of other instructions.*Id.* If the MAI conflicts with the substantive law, it must not be given.*State v. Carson*, 941 S.W.2d 518, 520(Mo.banc1997); *Clark v. Missouri & Northern Arkansas RR Co., Inc.*, 157 S.W.3d 665, 671(Mo.App.,W.D.2004). Not giving an instruction that comports with the MAI, the Notes on Use or the substantive law creates reversible

error. *State v. Westfall*, 75 S.W.3d 278, 280(Mo.banc2002). That error is presumed prejudicial and the State must "clearly show … the error did not result in prejudice."*Id.* at 284.

Instructions 19 and 21 conflict with *State v. Whitfield*, 107 S.W.3d 253(Mo.banc2003), *Ring v. Arizona*, 536 U.S. 584(2002), *Apprendi v. New Jersey*, 530 U.S. 466(2000) and §565.030.4RSMo.[15]

Capital defendants are entitled, under the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees, to have a jury find, beyond a reasonable doubt, all facts upon which increased punishments are contingent. *Whitfield*, 107 S.W.3d at 257; *Ring*, 536 U.S. at 600; *Jones v. United States*, 526 U.S. 227, 243 n.6(1999). Facts increase the maximum punishment when their absence render the higher sentence unavailable.*Ring*, 536 U.S. at 600-01.

All but the final step in §565.030RSMo are eligibility steps, requiring jury findings of fact.*Whitfield*, 107 S.W.3d at 256, 261. Instruction 19's "weighing" step requires "factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible."*Id.* at 261.

While *Whitfield*'s focus was on the jury's factual findings, *Whitfield* was based on *Ring* and *Apprendi*, which require those findings be unanimous beyond a

[15] This Court rejected this claim in *State v. Zink*, 181 S.W.3d 66, 74(Mo.banc 2005). Vincent presents it for reconsideration and preservation for federal review.

reasonable doubt.*Id.* at 257; *Ring*, 536 U.S. at 602; *Apprendi,* 530 U.S. at 494. Since these death-eligibility findings are like an element of a greater offense, *Id*. at 494 n.19; *Ring*, 536 U.S. at 609, the State bears that burden of proof.*In re Winship*, 397 U.S. 358(1970); *Jackson v. Virginia*, 443 U.S. 307(1979).

In penalty phase, the trier must assess punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor "(3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier…."§565.030.4RSMo.

Over objection,(T1806-08), Larner presented evidence of non-statutory aggravators. Eva Addison, Stacy Stevenson, Evelyn Carter, Dr. Burch, Detectives Hunnius and Anderson, and Mr. George testified about Leslie Addison's death and Evelyn and Eva testified about alleged threats to witnesses.(T1841-1909,1919-2034). Sgt. Akers testified Vincent possessed crack cocaine.(T1910-14). Patricia Franklin, Todd's mother, testified about her life and family history, including her separation and divorce from Todd's father, his imprisonment, her father's severe depression upon her mother's death, Todd's trusting, friendly, "clean-cut" nature, and her lack of grandchildren.(T2035-54). Todd's sister, Tara, testified about how Todd protected and supported her, helped their grandfather, and that she would never have nieces or nephews.(T2062-2073). Candace Hosea, Todd's ex-

girlfriend, testified Todd was happy, friendly, respectful, and cared about everyone.(T2057-61).

The jury was never instructed what, if any, burden of proof to apply to this evidence. This evidence, especially unadjudicated bad acts, lacks the reliability of evidence of prior convictions yet is enormously prejudicial.*State v. Debler*, 856 S.W.2d 641, 657(Mo.banc1993). Only through an instruction requiring the jury to find such facts unanimously beyond a reasonable doubt could some unreliability be cured. *Id.*[16]

Over objection (T2352-54), the Court gave Instruction 19:

> If you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. 18 exists, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment.
>
> In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial, including evidence presented in support of the statutory aggravating circumstances

[16] This Court has retreated from *Debler*, now reading it solely to require notice of non-statutory aggravators.*See, e.g., State v. Strong*, 142 S.W.3d 702, 719-20 (Mo.banc2004). Since *Debler's* analysis accords with *Whitfield* and *Ring*, this Court should re-adopt its rationale.

submitted in Instruction No. 18, and evidence presented in support of mitigating circumstances.

You shall consider any facts or circumstances which you find from the evidence in mitigation of punishment.

It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the facts or circumstances in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(LF656). Instruction 21 provides:

If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of Todd Franklin by imprisonment for life by the Department of Corrections without eligibility for probation or parole, and your foreperson will sign the verdict form so fixing the punishment.

(LF658).

Instruction 19's first paragraph violates *Ring*, *Apprendi*, *Whitfield* and *Winship*. Despite being a death-eligibility step, it tells jurors to "determine" whether mitigators outweigh aggravators. It thus puts the burden of proof on the

defense, not the State, as due process requires. *State v. Roberts*, 615 S.W.2d 496, 497 (Mo.App.,E.D. 1981); *State v. Ford*, 491 S.W.2d 540, 542-43(Mo.1973). Nor does it require the finding be beyond a reasonable doubt.*Winship, supra*.

The second paragraph is even worse, letting the jury, in weighing mitigators and aggravators, consider anything from either phase, whether "found" or not. *State v. Scott*, 183 P.3d 801(Kan. 2008). Although this is a death-eligibility step, whose "beyond a reasonable doubt" burden is on the State, it specifies no burden and never places it on the State. It lets the jury weigh evidence never found—under any legal standard—as aggravation. Since Larner told the jury he believed Leslie's death was why Vincent would receive death, that finding should have been made beyond a reasonable doubt.(T2379). Despite the critical importance of that evidence, the Instruction never told the jury how to consider it.

The Instruction also let the jury find evidence aggravating that it constitutionally may not. Especially since Larner argued in penalty phase closing the jury could consider aggravating that Vincent wasn't retarded, had no mental disease or defect, hadn't been abused, wasn't a juvenile(T2389-90,2405,2407), *Zant v. Stephens*, 462 U.S. 862(1983), the prejudice from this Instruction becomes clear. Because the jury didn't specify what it considered at this step, its finding is insulated from review.

Instruction 21 has similar problems. Although §565.030.4(3)RSMo requires a life without parole verdict if the jury "concludes" mitigators outweigh aggravators, the Instruction and MAI-CR3d require a "unanimous" finding. The

Instruction places the burden on the defense, *Ring*; *Winship*, and heightens that burden from a "conclusion"—e.g., any number of jurors—to a unanimous finding, contrary to the Legislature's mandate.

Vincent offered Instructions B-F.(LF663-76)(A-24-37). Judge Ross refused them, (T2352-55), although they more accurately reflect §§565.030.4 and 565.032.2 RSMo and *Ring, Apprendi* and *Whitfield*. Instruction B rectifies Instruction 19's infirmities that let the jury consider aggravating evidence it merely "found" in the weighing step, and requiring the jury "unanimously" find mitigators outweigh aggravators for a life without parole verdict.(LF663-65). Instruction C places the burden of proof for this death-eligibility step on the State, as *Whitfield* and *Ring* require.(LF666-70). Instruction D places the burden of proof on the State by making the jury determine whether mitigators weigh less than aggravators.(LF671-73). Instruction E makes appellate review possible by requiring the jury list its findings.(LF674). Instruction F remedies Instruction 21's *Whitfield* and *Ring* problems and allows appellate review.(LF675-76).

This Court should reverse and remand for a new penalty phase or reverse and order Vincent resentenced to life without parole.§565.040RSMo.

XII.State's Arguments Violate Due Process

The trial court erred and abused his discretion in overruling Vincent's objections and denying his mistrial requests and plainly erred in not declaring a mistrial based on the prosecutor's arguments telling jurors in:

Voir Dire

1. He worked for McCulloch, the elected prosecutor, for whom they may have voted;

2. Their answers didn't matter;

3. For a life without parole result, the jury must be unanimous;

4. Referred to other cases in which the State lacked evidence.

Guilt Phase Opening

1. **Mark Silas identified Vincent from a photo in the police station;**
2. **Larner's witnesses have "no reason to lie;"**
3. **Reads from letters in Michael's cell.**

Guilt Phase Closing

1. **Referred to evidence that hadn't been admitted and encouraged jurors to request inadmissible evidence during deliberations;**
2. **Suggested Vincent's rights to a jury trial and confrontation of Michael Douglas were "B.S.";**
3. **Referred to and encouraged jurors to feel how a .44 gun is fired although no evidence was presented about it and ignored the court's initial ruling;**

4. **Vouched for Hazlett's testimony and misled the jury about his criminal record;**
5. **Encouraged the jury to ignore evidence and vouched for the truth of out-of-court statements;**
6. **Called Vincent and his co-defendant "cold-blooded killers;"**
7. **Suggested defense counsel did not want the people of St. Louis County to convict someone of murder or protect its citizens;**
8. **"You represent St. Louis County;"**
9. **Suggested a lesser-included offense was absurd, contrary to the law;**
10. **Denigrated Vincent, saying he treated Franklin like an animal;**
11. **Aligned himself with jurors and against Vincent, saying "they don't think the way we think.";**
12. **Told jurors he had reasonable doubt about some evidence but it didn't matter;**
13. **Vouched for Lucas' credibility.**

<u>Penalty Phase Closing</u>

1. Told jurors Vincent treated Franklin like an animal and doesn't believe in the sanctity of human life;

2. Told jurors he didn't find anything mitigating in the evidence and they should thus ignore it;

3. Personalized that he felt the Addison killing warranted the death penalty;

4. Argued future dangerousness, that Vincent would kill again;

5. Personalized to jurors and equated their function with witnesses, whose lives, he said, were at risk from Vincent;

6. Argued outside the evidence that Vincent was the leader and dragged Michael into this crime;

7. Expanded the scope of victim impact past the victims of this offense;

8. Made emotionally-charged statements designed to ensure the jurors ignored the law;

9. Likened Vincent to an animal and worse, saying he killed for power, control, status and pleasure;

10. Stated Vincent's lack of a mental disease or defect is aggravating;

11. Stated that Vincent has a supportive family is aggravating;

12. Stated Vincent's lack of mental retardation is aggravating;

13. Stated Vincent's capacity to know right from wrong is aggravating;

14. Stated because Vincent wasn't sexually abused, it was aggravating;

15. Stated Vincent believes in the death penalty;

16. Stated Vincent showed no remorse;

17. Denigrated Vincent's constitutional rights, saying he deserved to be hunted down and killed by Franklin's family;

18. Told jurors that they represent the community;

19. Personalized to the jury, asking them to think of the terror Leslie and Todd experienced and telling the jury to hold and hug them and not let them down

because these arguments denied Vincent due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),19,21, in that Larner injected his personal beliefs; discounted veniremembers' responses; misstated the facts and law; injected facts not in evidence; injected evidence of other crimes; personalized to the jury; exceeded the scope of proper victim impact; vouched for witnesses' credibility; denigrated defense counsel; utilized epithets; injected heightened emotion; converted mitigators into aggravators, and commented on Vincent's right not to testify.

This Court has condemned prosecutorial argument that renders juries' verdicts unreliable.*State v. Storey*, 901 S.W.2d 886(Mo.banc1995); *State v. Rhodes*, 988 S.W.2d 521(Mo.banc1999). An accused is entitled to a fair trial and prosecutors must do nothing to deny it or obtain a wrongful conviction.*State v. Tiedt*, 357 Mo. 115, 206 S.W.2d 524, 526-27(banc1947); *Berger v. United States*, 295 U.S. 78, 88(1935);*Rule 4.3.8*.

Prosecutorial misconduct in argument is unconstitutional when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process."*Donnelly v. DeChristoforo*, 416 U.S. 637(1974); *Darden v. Wainwright*, 477 U.S. 168, 181(1986). Argument may be so outrageous it violates

due process and the Eighth Amendment.*Newlon v. Armontrout,* 885 F.2d 1328, 1337(8th Cir.1989); *Antwine v. Delo*, 54 F.3d 1357, 1364(8thCir.1995); *Shurn v. Delo*, 177 F.3d 662(8thCir.1999). *Newlon* and *Shurn* arose out of the same office, whose misconduct has been repeatedly condemned and is challenged here.

Trial courts have wide discretion in controlling closing argument but abuse it by allowing unwarranted, injurious arguments. *State v. Reyes*, 108 S.W.3d 161, 168(Mo.App.,W.D.2003). Larner's misconduct violated Vincent's state and federal constitutional rights to due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment. Judge Ross erred and plainly erred in overruling counsel's objections and mistrial requests, and not *sua sponte* declaring a mistrial.

Voir Dire

Voir dire is intended to expose juror bias so parties can intelligently exercise cause and peremptory challenges and select a fair, impartial jury.*State v. Clark*, 981 S.W.2d 143, 146(Mo.banc1998); *Morgan v. Illinois*, 504 U.S. 719, 729(1992). Questions calculated to create prejudice are impermissible.*State v. Lacy*, 851 S.W.2d 623, 629(Mo.App.,E.D.1993).

Larner repeatedly injected irrelevant considerations and attempted to co-opt veniremembers' allegiance: "I represent the people of St. Louis County. I represent the victims of St. Louis County. I work for Mr. Bob McCulloch. He's the elected prosecutor in St. Louis County. Many of you may have heard from him—of him and even voted for him from time to time through the years. That's

who I work for."(T42,125,184,238,303,398,476,553,616).[17] He converted the trial from an adversarial system with an impartial arbiter to one with the arbiter aligned with the State. "[A]s long as we adhere to an adversary system of justice, the neutrality and objectivity of the juror must be sacrosanct."*U.S. v. Johnson*, 892 F.2d 707, 713(8thCir.1989)(Lay, McMillian, JJ., concurring). Larner perverted the system to ensure an unfair trial.

Larner told veniremembers their answers didn't matter, limiting the likelihood voir dire would reveal relevant, useful information.*Clark*, 981 S.W.2d at 146. He told Dobin, "The Court has already ruled on your situation at the side bar. And neither myself nor the defense are going to ask you any questions during this process because of your statements at the side bar."(T124-25). He told Richmond, "Myself and defense counsel are going to skip over you, okay? … that's what we've been told to do … we're just going to skip over you, okay?"(T195). He told Middleton, "I'm not going to talk with you, ma'am, because of matters we've discussed when you came into court earlier…You're not going to be on this jury, ma'am."(T737). When Judge Ross noted Larner spoke to the wrong veniremember, Larner apologized but continued, "…the way we pick the jury is that out of the first 30 people, 14, 20, 25, 30, how it generally works is that the State has to…."(T738-39). After Judge Ross encouraged Larner to question Middleton, she stated, "Well, it's irrelevant, whatever my question is,

[17] Since counsel did not object, plain error review is requested.*Rule 30.20.*

so."(T739). Judge Ross told Middleton they were "concerned about everybody's point of view in the case…."(T740).[18]

Notwithstanding Judge Ross's attempt to ameliorate the damage, veniremembers repeatedly heard their answers didn't matter or they shouldn't answer. Middleton's belief her responses were "irrelevant" evidences this chilling effect.(T739).

The constitutional guarantee of an impartial jury can only be fulfilled through adequate voir dire.*Morgan*, 504 U.S. at 729-30. Because Larner told veniremembers their opinions didn't matter, that they disclosed disqualifying biases or information cannot be assured. This undermined the jury system's very structure.*Gray v. Mississippi*, 481 U.S. 648, 668(1987).

Larner misstated the law, misleading the jury.*State v. Jones*, 615 S.W.2d 416(Mo.1981);*Tucker v. Kemp*, 762 F.2d 1496, 1507(11thCir.1985);*State v. Storey*, 901 S.W.2d 886, 902(Mo.banc1995). He stated, "for a life without parole result, the jury must be unanimous."(T51,150-247,256,427,578,623). While the jury must choose death unanimously, no unanimity requirement exists for a life without parole verdict.*State v. Whitfield*, 107 S.W.3d 253, 257-61(Mo.banc 2003);§565.030RSMo;*State v. Scott*, 183 P.3d 801(Kan.2008).

[18] Since counsel only objected to Larner's final remark, plain error review is requested. *Rule 30.20.*

Larner referred to facts not in evidence, alluding to other cases.*Tucker v. Kemp*, 762 F.2d at 1507;*Drake v. Kemp*, 762 F.2d 1449, 1458-59(11th Cir. 1985)(en banc); *Storey*, 901 S.W.2d at 900-01. "[C]an you think of a case where someone might throw the weapon in the Mississippi River, for example? How many guns do you think are in the bottom of the Mississippi River? Not going to find those. So it's not required."(T765).[19]

Guilt Phase

Larner injected evidence of other crimes in opening, arguing Mark Silas identified Vincent from a photograph hanging in the police station.(T1007). Evidence of other crimes is inadmissible, violating the right to be tried solely for the charged offense.*State v. Clover*, 924 S.W.2d 823, 855(Mo.banc1996). Larner told the jury Vincent committed multiple offenses and should be punished for them.

Larner misstated and encouraged the jury to ignore the law.*State v. Debler*, 856 S.W.2d 641, 651(Mo.banc1993). "It doesn't matter what Silas says in court. His statement has been set in stone."(T1747). He directed they disregard a witness's sworn testimony in favor of an unsworn statement.

Larner repeatedly vouched for witnesses, stating **he** believed them. Larner became an unsworn witness, whose opinion should be valued since he was an officer of the Court. *Storey*, 901 S.W.2d at 901;*Berger*, 295 U.S. at 88. He

[19] Since counsel did not object, plain error review is requested.*Rule 30.20.*

asserted, despite the court's repeated rulings, his witnesses had no reason to lie(T1031-33),[20] and "Hazlett is not lying. I don't care what Hazlett's criminal record or whatever. It's not that bad. I did him a favor. I didn't charge him with a DWI."(T1743). Despite vouching for Hazlett's credibility and asserting his record wasn't "that bad," Hazlett was charged with forcible rape and armed criminal action and convicted of unlawful use of a weapon. (Franklin—1st trial:LF436.(T1229-32). Finally, Larner vouched, "Lucas might not be the smarter (sic) guy in the world, but he's probably one of the most credible guys in the world. He's got no convictions. He's 45 years old."(T1794).

Larner personalized and argued outside the evidence, encouraging the jury to set aside reason and common sense and decide on emotion.*Storey*, 901 S.W.2d at 901;*Gardner v. Florida*, 430 U.S. 349, 358(1977). Over initially-sustained and later-overruled objections, he argued, "If you've ever fired a .44, when you pull that trigger, bam, there's a kick…"(objection sustained) "…All right. Bang."(objection overruled). "Bang. You got to refocus, retrain that gun on that same spot."(T1737). He later told them, "You represent St. Louis County."(T1775). He encouraged the jury to put themselves into the action, thus creating the likelihood they would decide on emotion, not facts and common sense.*Id.*

[20] Counsel only objected to this initial argument. Plain error review is requested.*Rule 30.20.*

Larner argued without evidentiary support, again alluding to facts outside the record, encouraging the jury to decide not based on the evidence.*Storey*, 901 S.W.2d at 901.[21] In his opening, he read verbatim from letters not in evidence (T1033-37) and, in closing, stated, "I don't think you're going to get all the letters. There's all kinds of stuff in the letters that may not be admissible or relevant. And so the judge may or may not give you all of the letters. Ask for them. You'll get what the judge will give you."(T1726)[22].

Larner denigrated Vincent, again arguing with no evidentiary support, *Storey*, 901 S.W.2d at 901, and heightening the emotions of the jury, that, "They both wanted to kill the deer. That's all this man is to them is a deer… They don't look at him as a human being. They don't look at life that way…They look at the victim as an animal…This Todd Franklin is animal to them. It's like killing a deer."(T1781-82).

Larner denigrated defense counsel, *State v. Hornbeck*, 702 S.W.2d 90 (Mo.App.,E.D.1985);*State v. Harris*, 662 S.W.2d 276(Mo.App.,E.D.1983), encouraged the jury to ignore the law, and inserted his own opinions, by arguing, "Defense counsel makes a very good point. Why in the world would we want to

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[21]Counsel lodged no objection. Plain error review is requested.*Rule 30.20*.

[22]Larner's argument referred, at least in part, to references in Exhibits 400,401,402,407 and 409 to Vincent's convictions and death sentences having been overturned.

convict people—why would the people of St. Louis County want to convict someone for this? Why would anyone want to convict someone for this? Why in the world would St. Louis County want to protect its citizens?"(T1775).

Larner argued, contrary to the facts and the law, *Storey*, 901 S.W.2d at 902; *Tucker v. Kemp*, 762 F.2d 1496, 1507 (11th Cir. 1985), that, "No matter who you believe in this case, you cannot come back with murder second degree. That's absurd. That would be—that's what they want. Huge victory. That's what they want." (T1780).

Larner injected himself in the proceedings, encouraging the jury to credit his opinion because he is an officer of the Court and to otherwise disregard the law.*Storey*, 901 S.W.2d at 900-01. "If you have a reasonable doubt about that—so do I—I don't care."(T1783). He allied himself with the jurors, "You got to understand the mentality of what we're talking about in this case. I think you understand the mentality here. **They don't think the way we think.**"(T1782) (emphasis added).

Larner denigrated Vincent through epithets: "You never know with these guys. They're killers. They're cold-blooded killers. You never know what someone like Michael Douglas is going to say."(T1752). He denigrated counsel, the adversarial system and Vincent's constitutional rights, "What was all the B.S. about—this trial about cross-examining all these people about these inconsistent

statements about Michael Douglas?" (T1734).[23] The "cold-blooded" personal opinion isn't supported by evidence, *State v. Hodges*, 586 S.W.2d 420(Mo.App.,E.D.1979) and inflamed the jury's emotions. *State v. White*, 856 S.W.2d 917, 919 (Mo.App.,S.D.1993). The attacks on counsel falsely suggested counsel attempted to mislead the jury and subvert justice and denigrated Vincent's exercise of his constitutional rights.*State v. Reyes*, 108 S.W.3d 161, 170(Mo.App.,W.D.2003).

Penalty Phase

Penalty phase closing arguments undergo a "greater degree of scrutiny." *Caldwell v. Mississippi*, 472 U.S. 30, 329(1985); *California v. Ramos*, 463 U.S. 992, 998-99(1983). Larner encouraged the jury to render an unreliable verdict.

Larner created prejudice by personalizing, making himself an unsworn witness to whom the jury should listen in deciding punishment.*Storey*, 901 S.W.2d at 900-01. He argued, "there wasn't anything redeeming or mitigating about this defendant that came up in this trial. I didn't hear anything. I listened to the mitigation."(T2377). "The killing of Leslie is evidence in aggravation…That evidence, in and of itself, after you've opened that second door, the fact that he killed a second person, is probably what's going to tip over the edge and get him the death penalty. That's my feeling on it."(T2379). Larner claimed knowledge

[23] While counsel did not object then, she later requested a mistrial, which the court denied because her objection was untimely.(T1797).

and experience, which were "apt to carry much weight against the accused when they should carry none."*Id*.

Larner argued with no evidentiary support, *Burnfin*, 771 S.W.2d at 912;*State v. Cuckovich*, 485 S.W.2d 16(Mo.banc1972), to merely inflame the jury's emotions, that "It's as if it was a deer that he's killing. He has no—theirs is no sanctity for human life in this man."(T2376), and "He wants to kill [Eva]. He just didn't get a chance to kill her because he got caught in St. Charles. That's aggravating. He's not done killing." (T2380), and, "…he draws others into his web of violence. Look who he drew in: Michael Douglas, 16 years old at the time. He's 22. Big Bro. So he ruins Michael Douglas's life as well. You know how you know he's not the one being influenced? Because he goes out and shoots Darryl Bryant and Jermaine by himself. See, he's willing to kill by himself … He's the strong man. He's the leader in this killing. He's the one."(T2384), and "There was no stopping that guy. He doesn't care. It's like stomping a beetle. Those people meant nothing to him."(T2387).

Larner told the jury Vincent "kills for power, control, status. Those are his reasons to kill. You know, even animals don't kill for those reasons. What they do is they kill for food. He kills for pleasure."(T2389). By this emotionally-charged, factually-barren argument, he likened Vincent to something worse than an animal. He also told the jury, "Because, ladies and gentlemen, if there's one person that believes in the death penalty in this courtroom, it's that man."(T2404). These arguments impermissibly encouraged the jury to decide, not based on the

facts, but solely on emotion and thus heightened the unreliability of the verdict. *Tiedt*, 206 S.W.2d at 526-28.

Larner argued outside the evidence and also exceeded the proper scope of victim impact by telling the jury to consider the impact of Vincent's actions on people in other cases. *Payne v. Tennessee*, 508 U.S. 808, 830-31 (1991) (O'Connor, J., concurring); §565.030.4RSMo. "Look at the lives he's ruined: Leslie, Todd, Darryl, Jermaine, their families. Look at the lives he has ruined and their families." (T2384-85).

Increasing prejudice was Larner's argument personalizing to the jury. *Storey*¸901 S.W.2d at 901; *State v. Rhodes*, 988 S.W.2d 521, 528(Mo.banc1999). "Grossly improper," inflaming, arousing fear, and encouraging them to place themselves in the shoes of the victims, their families, and those Larner had speculated Vincent might kill because they were witnesses, Larner argued,

> Think about how horrible that is. Think about what that says about the criminal justice system which you all represent. And you are a huge part, the biggest part, of the criminal system. Because without juries, the criminal justice system doesn't work. And you know what? Without witnesses, it doesn't work either.

(T2381). In the same vein, he continued,

> And why did Todd testify? Because Todd had faith in the criminal justice system … That's Todd's faith in the criminal justice system. He's got faith in you.

(T2383). He placed the jury squarely opposite Vincent, making them a part of the equation, stating,

> Now, ladies and gentlemen, I want to tell you something. You are not just twelve individuals. You represent the—it's not just you or you or you standing alone. You represent society. You represent the community … You represent the community and you represent society and you represent what is good and decent about our community and about our society.

(T2411-12).

Finally, as the *coup de grace*, ignoring this Court's directive from *Storey* and *Rhodes*, Larner encouraged the jurors to feel the pain of the victims and their families. He argued:

> Ladies and gentlemen, everyone who has a sister or brother hopes and prays they never had to endure the pain and suffering that the Addisons and Franklins have had to endure by someone with a cruel and evil intent that that man had, because you see now how fleeting innocent life can be. Think of the terror that Leslie went through. Think of the terror that Todd went through. Think of the terror that Ms. Franklin, when she came home, went through. Think of the terror that Eva went through when she watched her sister get killed. Think of that.

(T2413). He concluded with, "Ladies and gentlemen, I leave you with Todd Franklin and Leslie Addison. Hold them. Hug them. Tell them you love them. But most of all, ladies and gentlemen, don't let them down."(T2414).

Larner commented, over objection, on Vincent's failure to testify. *Griffin v. California*, 380 U.S. 609, 615(1965);*State v. Redman*, 916 S.W.2d 787, 792 (Mo.banc1996); *State v. Parkus*, 753 S.W.2d 881, 885(Mo.banc1988). "And what about remorse? Has there been any remorse exhibited in this case?"(T2407).

He encouraged the jury to rely on alternative sources of law, denigrate Vincent's rights and the rule of law, and decide the case solely on emotion. *Debler*, 856 S.W.2d at 656. He told them:

> Now, ladies and gentlemen, we live in a civilized society. But there was a time when civil society wasn't so civilized and we would have given the McFadden and the Addison family an opportunity for retribution. **We would have let them hunt him down like he deserves.** But we don't live in that society. We gave him a fair trial. We put on evidence. He has a right to a lawyer, a jury of his peers.

(T2409)(emphasis added).

Again relying on emotion, *see,Penry v. Lynaugh*, 492 U.S. 302, 328(1989), to obtain a death verdict, Larner argued, "Please don't shoot me. My God. My God. Please don't shoot me. I'm 18. I want to live. I haven't lived. I haven't had children. I didn't do anything. I'm a totally innocent victim. I'm a woman."(T2387).

Larner repeatedly converted mitigators into aggravators, *Zant v. Stephens*, 462 U.S. 862(1983); *Poindexter v. Mitchell*, 454 F.3d 564, 586-87(6thCir.2006); *Campbell v. Bradshaw*, 2007 WL 4991266(S.D.Ohio2007); *Allen v. Woodford*,

395 F.3d 979, 1017-18(9thCir.2005), stating "normal" is aggravating, and makes people death-eligible. Larner argued:

"He has no mental disease, under the law. That's aggravating."(T2389);

"He's got no excuses. He's not sick in the head. I mean, he doesn't think like we think. There's no question that he's not. There's no mental disease or defect. He's not psychotic, schizophrenic, anything like that. That's aggravating."(T2389);

"He has a supporting family, and he still kills. That's aggravating. Everyone tried to help him in his life: is aggravating." (T2389);

"He has the intelligence to choose to do what is right. He's not retarded. His grades were average in school. That's aggravating."(T2389);

"He has the capacity to know what was right from wrong. That's aggravating. If he didn't have the capacity to know what was right from wrong, that would be in his favor: he didn't know right from wrong. That's not the case here. It's aggravating." (T2390);

"He was never beaten or abused or sexually molested by his family. He had every advantage. That's aggravating. And if he was beaten and sexually molested, that would be mitigating, wouldn't it? That would be mitigating. Well, that didn't happen. See, that's aggravating."(T2390);

"He was not molested. He was not beaten, abused by any member of his family at any time. He's not psychotic. He doesn't have any mental disease or defect, under the law. The best they could come up with, the best is that he didn't

bond properly with his mother and father. And his strengths: He made an "A" in Applied Math."(T2405);

"Now, sometimes we hear people are too young to get the death penalty. That doesn't apply here. Too insane, too crazy, too retarded: that doesn't apply here. Even his own doctors say that he has no mental defect, under the law."(T2407).

These arguments misled the jury, encouraging them to find, because Vincent is "normal," he deserved death. This provides no meaningful way to distinguish the few cases in which death is appropriate from the many in which it is not.*Furman v. Georgia*, 408 U.S. 238, 313(1972)(White, J., concurring);*Godfrey v. Georgia*, 446 U.S. 420, 423 n.2 (1980).

This Court must reverse and remand for a new trial.

XIII."Slim and Eva" Audiotape: Hearsay and Foundation Challenges

The trial court clearly erred and abused its discretion in overruling Vincent's objections and admitting State's Exhibit 148-B, the recording of a phone conversation between Eva and Slim, and State's Exhibit 148-C, the transcript, because this denied due process, confrontation, cross-examination, fair, reliable sentencing, and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a), in that (1) the State didn't lay a proper foundation to admit the exhibits, since it didn't establish Eva could hear everything Vincent stated, without Slim repeating it, and hence didn't establish (a) the recording's authenticity and correctness; (b) that no changes, additions, or deletions were made; (c) how the recording was preserved; and (d) the speakers' proper identification; and (2) the recording contained impermissible hearsay, because it contained Slim's assertions about what Vincent said, yet Slim never testified.

Larner argued that when Vincent was in jail, he had his friend, Slim, call Eva.(T1827). Larner argued Vincent's voice was in the background and Slim was the intermediary.(T1827;Ex.148-C). Larner read the transcript of the phone conversation in his opening.(T1827-33;Ex.148-B). He recounted that when Vincent supposedly said something, Slim tried to repeat it to Eva; when Eva responded, Slim repeated that to Vincent.(Ex.148-C). Larner proffered State's Exhibit 148-B, the recording.

Larner attempted to establish a foundation through Eva. She recognized one of the voices as Vincent's.(T1873). She testified State's Exhibit 148-B was a fair and accurate recording of her conversation with McFadden and Slim.(T1872-73).[24]

When Larner sought to play the recording, counsel objected, arguing it contained hearsay and lacked sufficient foundation.(T1867). The court overruled counsel's hearsay objections, stating, "those statements are not being offered for the truth of the matter but rather, simply, that they were said."(T1868). The court overruled the foundational objection, stating any party to the conversation could authenticate the tape.(T1869). Larner played the roughly 30-minute recording (Exhibit 148-B) and gave the jury the transcript to read.(Exhibit 148-C)(T1873-74). The issue is included in the new trial motion.(LF712-13).

A court's broad discretion in determining the admissibility of evidence will not be disturbed on appeal absent a clear abuse.*State v. Wahby*, 775 S.W.2d 147, 153(Mo.banc1989). An abuse of discretion occurs when the ruling clearly offends the logic of the circumstances or becomes arbitrary and unreasonable.*State v. Hall*, 982 S.W.2d 675, 680(Mo.banc1998).

The foundation for admitting a sound recording includes showing: (1) the recording device could take testimony, (2) the operator of the device was

[24] Although Eva did not know Slim and had not identified his voice at the first trial, (*McFadden* SC86857--T586-87), by this trial, she could identify it.(T1874).

competent, (3) the recording was authentic and correct, (4) changes, additions, or deletions have not been made, (5) how the recording was preserved, (6) identification of the speakers, and (7) the testimony was elicited voluntarily, without inducement.*Wahby*, 775 S.W.2d at 153; *State v. Spica*, 389 S.W.2d 35,44 (Mo.1965).

Virtually every foundational requirement is missing here. The recording operator's competence is typically established through his testimony and experience with the task.*Wahby*, 775 S.W.2d at 153-54; *State v. Fletcher*, 948 S.W.2d 436,440(Mo.App.,W.D.,1997). Here, the State never called the person who made the recording or established his competence. Eva could identify Vincent's voice but only by this second trial professed to know who Slim was.(T1874;Ex148-C, p.26). The State never showed the person who made the recording listened while it was being made and later checked to ensure its accuracy.*Fletcher*, 948 S.W.2d at 440. The defense never attacked the credibility of whoever made the recording.*Id.*

Most importantly, the State never established the recording's authenticity and correctness or show changes, additions, or deletions had not been made. Vincent acknowledges Eva testified it was a fair and accurate recording.(T1872-73). But Eva was not competent to render that conclusion as to the entire tape. Slim was the only one who could have because he was the only one who heard all of the speakers. Eva spoke to Slim, who relayed what she said to Vincent, and vice versa. During the conversation, Eva may have heard Vincent in the

background loudly enough to discern what he was saying, but relied on Slim to tell her what Vincent said. The recording itself demonstrates Eva could not have heard the whole conversation clearly enough to vouch for the accuracy of the recording or the transcript. Because Eva could not vouch for its accuracy and completeness, the State did not prove with "reasonable assurance" tampering did not occur.*State v. Jones*, 877 S.W.2d 156,157(Mo.App.,E.D.1994). The State failed to demonstrate a proper chain of custody.*Fletcher*, 948 S.W.2d at 440.

Furthermore, the tape should not have been admitted because Slim did not testify. Evidence of what Slim stated Vincent told him was hearsay. Hearsay is any out-of-court statement used to prove the truth of the matter asserted and depending on the statement's veracity for its value.*Smulls v. State*, 71 S.W.3d 138,148(Mo.banc2002). Everything Slim stated Vincent told him was hearsay.

Reversal is required when prejudice from improperly admitting evidence is outcome-determinative.*State v. Black*, 50 S.W.3d 778,786(Mo.banc2001). The erroneously-admitted evidence must have so influenced the jury that, when considered and balanced against all properly-admitted evidence, a reasonable probability exists the result would have been different but for the erroneously-admitted evidence.*Id*.

In Exhibits 148-B and C, Vincent threatened Eva and told her to sign papers saying he hadn't shot Leslie and she wouldn't testify against him.(Ex.148-C,p.3-4,8,10,20,32-33). Eva stated she had heard Vincent told many people about

killing Leslie and then laughed.(Ex148-C,p.26). In closing, Larner relied heavily on Vincent's threats and lack of remorse to argue for death.(T2380-81,2407).

Admitting these exhibits denied Vincent due process, confrontation and cross-examination, a fair and reliable capital sentencing trial, and freedom from cruel and unusual punishment. This Court must vacate his death sentence and impose life without parole.

XIV.Capital Offense Not Charged: *Apprendi* Violations

The trial court erred in overruling Vincent's pre-trial *Apprendi* motions; not quashing the information; proceeding to penalty phase; accepting the jury's verdict and sentencing Vincent to death because this denied Vincent due process, a jury trial, reliable sentencing, and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV, Mo.Const.,Art.I,§§10,18(a),21, in that statutory and non-statutory aggravators are facts increasing the range of punishment for first degree murder from life without parole to death that must be pled in the charging document and found by the jury unanimously beyond a reasonable doubt.

A jury must find any fact that increases the maximum penalty for a crime. *State v. Whitfield*, 107 S.W.3d 253(Mo.banc2003). All but §565.030.4RSMo's final step make the jury's factual findings prerequisites for a defendant's death-eligibility.*Id.* at 261. "Every fact that the legislature requires be found before death may be imposed must be found by the jury."*Id.* at 257. Due Process and the Sixth Amendment's notice and jury trial guarantees also require those eligibility factors be charged to seek death.*Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). Since Vincent's charging document never alleged eligibility factors, Vincent was only charged with the non-death-eligible offense of un-aggravated first degree murder. This capital prosecution violated his state and federal

constitutional rights to due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment.[25]

Before trial, Vincent moved to preclude the State from seeking death, to require jury findings, to quash the information, and to submit instructions that comply with *Ring* and *Apprendi*.(LF84-91,97-111,146-50,151-53,171-200,207-17,227-233). The trial court rejected his challenges.(LF257-59;T4-6). Vincent preserved them in his new trial motion. (LF702-07,718-24).

The State charged Vincent by indictment and substitute information with first degree murder.(LF9,26-30). It never charged statutory and non-statutory aggravators but filed Notices of Evidence in Aggravation, alleging statutory and non-statutory aggravators.(LF38-41,276-78,456-59).

The Due Process Clause and the Sixth Amendment's notice and jury trial guarantees require "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."*Jones v. United States*, 526 U.S. 227, 243 n.6(1999); *Apprendi v. New Jersey*, 530 U.S. 466, 490(2000). The critical inquiry is "one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty

[25] This Court rejected this argument, *State v. Forrest*, 183 S.W.3d 218, 229 (Mo.banc2006); *State v. Gill*, 167 S.W.3d 184, 193-94(Mo.banc2005); *State v. Cole*, 71 S.W.3d 163, 171(Mo.banc2002), but Vincent requests reconsideration.

verdict?"*Id.* at 494. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt."*Ring v. Arizona*, 536 U.S. 584, 602(2002)(citations omitted). Because aggravators are "'the functional equivalent of an element of a greater offense,'… the Sixth Amendment requires that they be found by a jury."*Id.* at 609, citing *Apprendi*, 530 U.S. at 494,n.19.

Applying *Ring* to Missouri's statutory death penalty provisions, this Court held a defendant is constitutionally-entitled to have a jury make "the factual determinations on which his eligibility for the death sentence [is] predicated."*Whitfield*, 107 S.W.3d at 256. The *Ring* "Court held that not just a statutory aggravator, but every fact that the legislature requires be found before death may be imposed must be found by the jury."*Id.* at 257.

"Any fact (other than prior conviction) that increases the maximum penalty for a crime **must be charged in an indictmen**t, submitted to a jury, and proven beyond a reasonable doubt."*Jones*, 526 U.S. at 243 n.6(emphasis added). Only the jury can find the aggravators that make a crime death-eligible since they "operate as 'the functional equivalent of an element of a greater offense.'"*Ring*, 536 U.S. at 602,609(citation omitted).

This Court applied *Ring* to Missouri's statute, holding, "every fact that the legislature requires be found before death may be imposed," must be found by the jury beyond a reasonable doubt.*Whitfield*, 107 S.W.3d at 261. *Whitfield* considered these factual findings elements of a greater offense.

Thus, although §565.020RSMo ostensibly creates a single crime labeled first-degree murder, for which punishment is life without parole or death, §§565.020 and 565.030.4 establish two distinct offenses—un-enhanced first-degree murder, a knowing and deliberate murder, for which punishment is life without parole, and aggravated, enhanced, first-degree murder, which requires proof beyond a reasonable doubt of at least one statutory aggravator, and for which punishments are life without parole or death.

Since a jury's finding beyond a reasonable doubt of at least one statutory aggravator is the threshold to its ability to recommend death, *State v. Shaw*, 636 S.W.2d 667, 675(Mo.banc1982), statutory aggravators are elements of the enhanced offense. "[F]acts that expose a defendant to a punishment greater than that otherwise legally prescribed [are] by definition 'elements' of a separate legal offense…."*Harris v. United States*, 536 U.S. 545, 563(2002), citing *Apprendi*, 530 U.S. at 483, n.10. Thus, unless the charging document pleads these additional elements, the State only charges un-enhanced first-degree murder, for which the maximum punishment is life without parole.

"[A] conviction upon a charge not made or upon a charge not tried" denies due process.*Jackson v. Virginia*, 443 U.S. 307, 314(1979), *citing Cole v. Arkansas*, 333 U.S. 196, 201(1948); *Presnell v. Georgia*, 439 U.S. 14(1978). The charging document must actually charge a crime. It is sufficient if "'it contains all the essential elements of the offense as set out in the statute creating the offense.'" *State v. Stringer*, 36 S.W.3d 821, 822(Mo.App.,S.D.2001); *State v. Haynes*, 17

S.W.3d 617, 619(Mo.App.,W.D.2000); *State v. Pride*, 1 S.W.3d 494, 502(Mo.App.,W.D.1999).

In *State v. Nolan*, 418 S.W.2d 51(Mo.1967), this Court held the trial court lacked jurisdiction to impose an enhanced sentence for first-degree robbery "by means of a dangerous and deadly weapon." The sentence, "based upon a finding of the jury of an aggravated fact not charged in the information, is illegal" and the court lacked "power or jurisdiction to impose" it.*Id.* at 54.

Since the State pled no facts to make Vincent death-eligible, the only authorized punishment was life without parole. This argument often is rejected because of the inaccurate view that this rule only applies through the federal Indictment Clause.

Like the Fifth Amendment's Indictment Clause, Missouri's 1875 Constitution required all prosecutions for capital and felony offenses be by indictment. Missouri's 1900 Constitution subsequently allowed prosecution either by indictment or information.*State v. Kyle*, 65 S.W. 763(Mo.1901); *State v. Cooper*, 344 S.W.2d 72(Mo.1961).

When the State charges by information, the defendant is protected by a preliminary hearing before the prosecution can proceed.*State v. Gieseke*, 108 S.W. 525(Mo.1908). A primary "purpose of a preliminary examination is 'to safeguard them (the accused) from groundless and vindictive prosecutions.'"*State ex rel. McCutchan v. Cooley*, 12 S.W.2d 466, 468(Mo.1928); *State v. Sassaman*, 114 S.W. 590(Mo.1908).

The Fifth Amendment's Indictment Clause mandates "presentment or indictment of a Grand Jury." This ensures a defendant's jeopardy is limited "to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge."*Stirone v. United States*, 361 U.S. 212, 218(1960). It also "serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power."*United States v. Cotton*, 535 U.S. 625, 631, 634(2002); *United States v. Miller*, 471 U.S. 130, 142-43, n.7(1985). "The grand and petit juries thus form a 'strong and two-fold barrier … between the liberties of the people and the prerogative of the [government].'"*United States v. Harris*, 536 U.S. 545, 564(2002)(Kennedy, J., concurring); *Duncan v. Louisiana*, 391 U.S. 145, 151(1968).

The indictment plays an important role. Grand juries are "a substantial safeguard against oppressive and arbitrary proceedings … [T]o permit the use of informations where … the charge states a capital offense, would … make vulnerable to summary treatment those accused of … our most serious crimes."*Smith v. United States*, 360 U.S. 1,9(1959); *United States v. Green*, 372 F.Supp.2d 168(D.Mass.2005).

The Indictment Clause protects the accused through independent citizens who check prosecutorial authority and provide notice of charges so he can prepare his defense.*United States v. Duncan*, 598 F.2d 839, 848(4thCir.1979). This meets the demands of the Fifth and Sixth Amendments' Indictment and Notice Clauses.

United States v. Wheeler, 2003WL1562100 (D.Md.2003) at *1; *United States v. Higgs*, 353 F.3d 281, 296(4thCir.2003).

In state prosecutions, what is required? "The federal constitution provides the floor, not the ceiling, for protecting individual rights." Hon. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U.L. Rev. 535(1986). State Constitutions can go no lower. They must protect the individual's rights co-extensively with the federal constitution. *Oregon v. Haas*, 420 U.S. 714, 719(1975).

That the Fourteenth Amendment's Due Process Clause did not incorporate the Fifth Amendment's right to be charged by indictment, *Hurtado v. California*, 110 U.S. 516, 534-35(1884), does not resolve the question. Missouri may not deny the protections the federal Constitution affords. While Missouri can choose how to charge a criminal defendant, it cannot deny the "safeguard against oppressive and arbitrary proceedings" afforded by **some** check on prosecutorial authority. Only with that and notice are the full panoply of rights of the federal Constitution guaranteed. *Green*, *supra*.

It is often argued the Fifth Amendment's Indictment Clause does not apply to the States, *see, Apprendi*, 530 U.S. at 477, n.3, and the only federal constitutional limitation on state charging documents derives from the Sixth Amendment's notice requirement. *Blair v. Armontrout*, 916 F.2d 1310, 1329(8th

Cir.1990). Those arguments are based on flawed and incomplete readings of *Hurtado*.

While *Hurtado* did not require that state court prosecutions proceed by indictment, it did not discount States' constitutional obligations. "[W]e are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information—**after examination and commitment by a magistrate, certifying to the probable guilt of the defendant**, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law."*Id.* at 538, n.6 (emphasis added).

Whether prosecuted by indictment or information, key is that an independent third party—magistrate or grand jury—review the charges. *See*, *McCutchan*, 12 S.W.3d at 468. In capital cases, since aggravators are elements of the offense, they, too, must be reviewed.

Vincent's charging document did not include the aggravators making him death-eligible. This Court must reverse and order Vincent re-sentenced to life without parole.

CONCLUSION

Vincent requests this Court reverse and remand for a new trial, a new penalty phase, or re-sentence him to life without parole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of July, 2008, one true and correct copy of the foregoing brief and floppy disk(s) containing a copy of this brief was hand-delivered to the Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, MO 65102.

_____

Janet M. Thompson

CERTIFICATE OF COMPLIANCE

I, Janet M. Thompson, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 28,391 words, which does not exceed the 31,000 words allowed for an appellant's opening brief.

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Janet M. Thompson